4-593

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 261.

THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ADAM SCHWENK, GUARDIAN OF FERGUS JOSEPH McDONOUGH, AND THERESA McDONGUGH, AND MICHAEL DUNN, GUARDIAN OF CHARLES NOLAN AND CATHERINE NOLAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES OF THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 19, 1874.

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1 In the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit.

ADAM SCHWANK, GUARDIAN OF FERGUS JOSEPH McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan,
vs.
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company.
} Certified under act of Congress.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss :

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April sessions, 1872, No. 13.

It is thus contained :

Be it remembered that on the third day of August, in the year of our Lord one thousand eight hundred and seventy-two, Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, plaintiffs, by their attorney, B. Frank Boyer, esquire, come into court here and present the certified copy of process and record from the court of common pleas of Berks County, of Pennsylvania ; which, being filed, is in the words and of the tenor following, to wit :

2 Among the records and proceedings of the court of common pleas of Berks County, Pennsylvania, it thus contained :

SEAL OF COURT OF COMMON PLEAS OF BERKS CO., PA.

Appearance-docket entry.—February term, 1870, *No.* 96.

Boyer.

CHARLES NOLAN, ADM'R OF MARY McDONOUGH,
vs.
CONNECTICUT MUTUAL LIFE-INSURANCE COMpany, February 13, 1871. Declaration filed.
} 96.

Sum's in debt issued Feb. 1, 1870.

Feb'y 12, 1870, served personally on William Coleman, agent for the Con. Life-Insurance Company, by giving him a true and attested copy. So answers

WM. B. ALBRIGHT.

Record $15.75, p'd by defdt.'s attys.

May 19, 1870, on motion of B. Frank Boyer, esq., and affidavit filed, the court permit the record in the above case to be amended by striking out the name of the present plaintiff and inserting in lieu thereof the names of Adam Schwank, guardian of Fergus Joseph McDonough
3 and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, as the party plaintiffs.

March 11, 1871.—Petition for removal of cause into the circuit court of the United States filed.

Same day court grant a rule to show cause why the case should not be removed into the circuit court of the United States.

Same day bond filed.

June 3, 1872.—Rule made absolute.

4 *Copy of præcipe.*

CHARLES NOLAN, ADMINISTRATOR OF Mary McDonough,
vs.
CONNECTICUT MUTUAL LIFE-INSURANCE Company.

Issue summons in debt ret'ble to next term.
Yours, &c.,

B. FRANK BOYER,
Atty. for Plffs.

To GEO. K. LEVAN, Esq., *Proth'y.*

(Endorsement:) 96. Feb. T., 1870. Chas. Nolan, admr., vs. Connecticut Mutual Life-Insurance Co. Sum's præcipe. Filed Feb. 1, 1870.

5 BERKS COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of Berks County, greeting:

We command you that you summon The Connecticut Mutual Life-Insurance Company, so that they may appear before our court of common pleas to be held in Reading, in and for said county, on the second Monday of February next, *next*, to answer Charles Nolan, admr. of Mary McDonough, of a plea of debt.
And have you then and there this writ.
Witness the honorable Warren J. Woodward, esquire, president of the said court, the 1st day of February, A. D. 1870.

{SEAL OF COURT.}

GEO. K. LEVAN,
Prothonotary.

(Endorsed:) 96. February term, 1870. Charles Nolan, admr. of Mary McDonough, vs. Connecticut Mutual Life-Insurance Company. Sum's in debt. Albright, $1.50.

6 Feb. 12, 1870, served personally on Wm. Coleman, agent for the Con. Life-Insurance Company, by giving him a true and attested copy.
So answers,

WM. B. ALBRIGHT.

BOYER, *Atty.*

7 *Copy of declaration.*

In the court of common pleas of Berks County, of February term, 1870.

ADAM SCHWANK, GUARDIAN OF FERGUS Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan,
vs.
THE CONNECTICUT MUTUAL LIFE-INSURance Company.
} No. .

BERKS COUNTY, *ss:*

The Connecticut Mutual Life-Insurance Company were summoned to

answer Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, of a plea of trespass on the case, in assumpsit. Thereupon the said plaintiff, by B. Frank Boyer, their attorney, complains: For that whereas a certain Mary D. McDonough heretofore, to wit. on the 26th day of March, A. D. 1867, at Reading, in the county aforesaid, caused to be made a certain writing or policy of assurance, purporting thereby and containing therein that in consideration of the sum of four hundred and twenty-one dollars and fifty cents to the said Connecticut Mutual Life-Insurance Company in hand paid by Mary D. McDon-
8 ough, wife of Anthony A. McDonough, of Reading, Pa., and of the annual premium of four hundred twenty-one dollars and fifty cents, to be paid on or before the 26th day of March in each year during the continuance of the said policy, did assure the life of Anthony A. McDonough, of Reading, in the county of Berks, State of Pennsylvania, for the sole use of the said Mary D. McDonough, in the amount of five thousand dollars, for the term of the whole continuance of his life. And the said company did thereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured to the assured, her executors, administrators, or assigns, for her sole use, within ninety days after due notice and proof of the death of the said Anthony A. McDonough, deducting therefrom all notes taken for premiums unpaid at that date; and in case of the death of the said Mary D. McDonough before the decease of the said Anthony A. McDonough, the amount of said insurance should be payable, after her death, to her children, for their use, to their guardian, if under age, ninety days after notice and proof of the death of the said Anthony A. McDonough as
9 aforesaid; and also conditioned and agreed that, if at any time after the payment of three premiums on said policy, it should be surrendered while yet in force, the company will issue a paid-up noneforfeiture policy therefore for such an amount as the then present value of said policy would purchase as a single premium; provided always, and it was therein declared to be the true intent and meaning of said policy, and the same was accepted by the assured upon the express conditions, that in case the said Anthony A. McDonough should die upon seas, or shall, without the consent of this company previously obtained and endorsed upon this policy, pass either by sea or land beyond the settled limits of the United States, (excepting by land or on lakes and rivers into the settled limits of the British Provinces of the two Canadas, Nova Scotia, or New Brunswick;) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November; or shall, without such previous consent thus endorsed, visit California or Oregon, or pass into the Territories of the United States lying west of the twenty-first meridian of longitude from Washington; or shall, without such previ-
10 ous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted;) or shall, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as fireman or brakeman upon a railroad, or as an officer, hand, or servant of any steam vessel, or in the manufactur' or transportation of gunpowder; or in case he shall become so far intemperate as to impair his health or induce delirium tremens, or shall die of his own hand, or in a duel, or in con*fi*dence thereof, or by the hands of justice, or in the known violation of any law of the State or the United States, or of any government where he may be, this policy shall be void and of no effect.

And it was also understood and agreed to be the true intent and meaning hereof that if the proposals, answers, and declaration made by the said Mary D. McDonough, and bearing date the twenty-fifth day of March, 1867, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in
11 such case this policy shall be null and void; or in case the said assured shall not pay the said annual premimus on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof; and this policy shall cease and determine.

And it is further understood and agreed that this policy shall not take effect and become binding on said company until the premium above named shall be actually paid to said company, or to some person authorized by them to receive it.

And it is further agreed that in every case where this policy shall cease or become or be null and void, all previous payments made thereon and all dividend-credits accruing therefrom shall be forfeited to the said company, as by the said writing or policy of assurance more fully appears.

And the said plaintiffs further say that the declaration, proposal, and answers in the said policy mentioned were and are as follows:

I, Mary D. McDonough, of Reading, county of Berks, State of Pennsylvania, being desirous of effecting an assurance with the Connecticut Mutual Life-Insurance Co., in the sum of five thousand dollars,
12 upon the life of Anthony A. McDonough, of Reading, county of Berks, and State of Pennsylvania, during the term of life, do hereby declare that his age next birthday will be sixty-two years; that he is in good health, of sober and temperate habits, and does usually enjoy good health, and that the following answers and statements are correct and true, in which I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of his health, habits of life, or condition which may render an assurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted.

And I do hereby declare that I have an interest in the life of said Anthony A. McDonough to the full amount of the said sum of five thousand dollars.

And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration shall be the basis and form a part of the contract or policy between me and the said company, and that if the same be not in all respects true
13 and correctly stated the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend-credits which may accrue therefrom shall be forfeited to said company.

And I further agree that the assurance hereby proposed shall not be binding on said company, and no policy shall attach, until the amount of premium as stated therein shall be paid to said company in the lifetime of said assured.

Dated at Reading this 25th day of March, 1867.

(Signed) MARY D. McDONOUGH.
ANTHONY A. McDONOUGH.

Witness: EDWIN TILDEN.

Questions and answers above referred to.

1. Name and residence of the person for whose benefit this assurance is proposed. If wife or husband, so state.	Mary D. McDonough, Reading Pa., wife of Anthony A. McDonough.
2nd. Name and residence of the person whose life is proposed to be insured. (See note as above.)	Anthony A. McDonough, Reading, Pa.
If wife or husband, father, mother, brother, or sister of applicant, so state.	Husband of applicant.
14 3rd. Occupation of person whose life is proposed to be insured, and whether married or single.	Physician; married.
4th. Place and date of birth of the party whose life is to be insured, giving months and days.	Ireland; August 11, 1803.
5th. Age next birthday.	Sixty-two.
6th. Is the party now, and has he always been, of temperate habits?	Yes.
7th. Has the party resided out of the United States; and if so, where, for what purpose and period, and what was the effect of such residence on his health?	Resided in Ireland previous to coming to the United States.
8th. Has the party been vaccinated or had the small-pox?	Yes; yes.
9th. Has father, mother, brother, or sister of the party died or been afflicted with consumption, or any other disease of the lungs, or insanity? If so, state full particulars of each case.	No.
15 How many brothers and sisters in all?	Six.
How many have died, and of what disease?	One died of dropsy.
What is the present health of the survivors?	The others did not come to this country, and am not certain of what disease they died, but am sure it was not consumption.
10th. Has the party been, or is he now, afflicted with fits, dropsy, or liver complaint, asthma, spitting of blood, gout, rheumatism, insanity, rupture, or fistula, and which?	No.
11th. Has the party been afflicted with disease of the heart, of the urinary, and, if a female, of the uterine organs? If so, which?	No.
12th. Has the party been afflicted during the last seven years with any severe or acute constitutional disease, and what?	No.

16	13th. Is the party now afflicted with any disease or disorder, and what?	No.
	14th. Has the party ever met with any accidental or serious personal injury? If so, what was it?	No.
	15th. Name and residence of the party's usual medical attendant, or, if he have none, of some other medical person, to be referred to for information as to his health.	Refers to Adam Schoener, M. D., as an acquaintance.
	16th. Name and residence of an intimate friend, to be referred to for similar information.	C. W. L. Hoffeditz, Reading, Pa.
	17. Amount of insurance applied for, $5,000.	Five thousand dollars.
	18. Term for which the insurance is desired, and specified plan.	Life.
	19th. Has a previous proposal been made for insurance in this or any other company; and, if so, was it accepted or not; and, if accepted, for what amount?	Yes*t*. Accepted for $5,000.
17	20th. Is the party aware that any untrue or fraudulent allegations made in *a*ffecting the proposed assurance will render the policy void, and that all payment of premiums made thereon, and divided credits accruing therefrom, will be forfeited?	Yes.

(Signed) ANTHONY A. McDONOUGH.

Witness: EDWIN TILDEN.

And therefore afterwards, to wit, on the fourth day of April, A. D. 1867, at the county aforesaid, the said Mary D. McDonough, at the special instance and request of the said defendants, then and there paid to the said defendants a certain sum of money, to wit, the sum of four hundred and twenty-one dollars and fifty cents, as a premium and reward for the insurance of the said sum of five thousand dollars upon the life of the said Anthony A. McDonough, as in the said policy is mentioned, for one year, to wit, from the 26th day of March, A. D. 1867, to
18 the 26th day of March, A. D. 1868. And the said Mary D. McDonough afterwards, to wit, on the 6th day of March, A. D. 1868, at the count aforesaid, at the special instance and request of the said defendants, then and paid unto the said defendants the further sum of four hundred and twenty-one dollars and fifty cents as a premium for the renewal continuance of the said policy for insurance for the further term of one year from the 26th day of March, A. D. 1868, to the 26th day of March, A. D. 1869, as in the said policy of insurance provided.

And afterwards, to wit, on the 13th day of March, A. D. 1869, the said plaintiffs paid the further sum of four hundred and twenty-one dollars and fifty cents to the said defendants as a premium for the renewal and continuance of said policy for the further term of one year from the 26th

day of March, A. D. 1869, to the 26th day of March, A. D. 1870, as in the said policy of insurance provided.

And the said plaintiffs in fact say that the aforementioned declaration and the said proposal and answer so referred to in said policy as aforesaid, so by the said Mary McDonough made as aforesaid,
19 was in all respects true, to wit, at the county aforesaid.

And the said plaintiff' further saith that at the time of the making of the said last-mentioned declaration, and also at the time of the making of the said last-mentioned policy of insurance and of the said last-mentioned promise and understanding of the said defendants as last aforesaid, the said Mary D. McDonough, and also at the time of the death of the said Anthony A. McDonough, as hereinafter mentioned, they the said plaintiffs were interested in the life of the said Anthony A. McDonough to a large amount, to wit, to the amount of all the monies by him or them insured thereon, to wit, at the county aforesaid; of all which the said defendants had notice. And the said plaintiffs further say that on or about the sixteenth day of April, A. D. one thousand eight hundred and sixty-eight, the said Mary D. McDonough aforesaid died, leaving surviving her four children, to wit, Fergus Joseph McDonough, Theresa McDonough, Charles Nolan, and Catharine Nolan, all of whom are still in their minority; the said Fergus Joseph and Theresa having Adam Schwank for their guardian, and the said Charles and Catharine having Michael Dunn for their guardian. And the said
20 plaintiff' further saith that afterwards, to wit, on or about the twelfth day of April, A. D. one thousand eight hundred and sixty-nine, at the county aforesaid, the said Anthony A. McDonough died, and the said plaintiffs further say that the decease of the said Anthony A. McDonough as aforesaid was afterwards, to wit, on or about the first day of May, A. D. 1869, at the county aforesaid, duly certified to the said defendants, and satisfactory proof was produced to the said company by the said plaintiffs of the death of the said Anthony A. McDonough as aforesaid, and although the said Mary D. McDonough had, and said plaintiffs have, in all things conformed themselves to, observed, performed, fulfilled, and kept all things in the said policy of insurance and the said conditions and the said stipulations contained, on their part or on the part of the said Mary D. McDonough to be observed and performed according to the form and effect of the said policy of assurance, and of the said proposals and conditions, and although ninety days after the decease of the said Anthony A. McDonough was duly certified to the said company, and after satisfactory proof was so produced of the
21 death of the said Anthony A. McDonough as aforesaid, has long since elapsed, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice, and were then and there requested by the said plaintiffs to pay them the said sum of five thousand dollars so insured as aforesaid; yet the said defendants, not regarding their said promise and undertaking so by them made as aforesaid, did not, nor would, when they were so requested as aforesaid, or at any time before or since, pay the said sum of five thousand dollars or any part thereof, but have hitherto wholly neglected and refused so to do, and still neglect and refuse so to do, to wit, at the county aforesaid.

And whereas, also, the said defendants, to wit, on the day and year aforesaid, to wit, at the county aforesaid, was indebted to the said plaintiffs in the further sum of five thousand dollars like money for so much money by the said plaintiff before that time lent and advanced and paid

laid out and expended, to and for the use of the said defendants and at their like special instance and request.

And also, in the further sum of five thousand dollars like money
22 for other money by the said defendants before that time had and received to and for the use of the said plaintiff.

And, also, in the further sum of five thousand dollars like money for so much money then and there found to be due and owing from the said defendants to the said plaintiff, and in arrear and unpaid upon an account then and there stated between them.

And being so indebted, they the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county, undertook and faithfully promised the said plaintiff to pay them the said several sums of money in this court mentioned when they the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants, not regarding their said several promises and undertakings, have not paid the said several sums of money, or any of them, or any part thereof, to the said plaintiff, although often requested so to do; but the said defendants have hitherto neglected and refused and still do neglect and refuse to pay the same to the said plaintiffs, to the damage of the said plaintiff' ten thousand dollars; and therefore they bring suit, &c.

JOHN DOE,
RICHARD ROE,
Pledges, &c.

B. FRANK BOYER,
Atty. for Pltffs.

23 (Endorsement:) 96 February T., 1870. Adam Schwank, guardian, &c., & Michael Dunn, guardian, vs. The Connecticut Mutual Life-Insurance Company. Declaration filed February 13, 1871. Boyer, atty.

24 BERKS COUNTY, *ss:*

CHARLES NOLAN, ADMINISTRATOR OF Mary McDonough,
vs.
CONNECTICUT MUTUAL LIFE-INSURANCE COMpany.

96. February term, 1870.

B. Frank Boyer, being duly sworn, says that in bringing the above suit a mistake has occurred in the name of the parties; that the suit should have been brought in the name of Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan; that the mistake in bringing the suit was occasioned by an oversight on part of himself as counsel.

B. FRANK BOYER.

Sworn & subscribed before me May 19, 1870.
CHAS. KESSLER, *A. J.*

(Endorsement:) 96. February T., 1870. Filed May 19, 1870.

May 19, 1870.—On motion of B. Frank Boyer, esq., & affidavit filed, the court permit the record in the above case to be amended by striking out the name of the present plaintiff and inserting in lieu thereof the

names of Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, as the party plaintiffs.

25 *Copy of petition.*

To the honorable the judges of the court of common pleas of Berks County, Pennsylvania.

The petition of the Connecticut Mutual Life-Insurance Company, a company duly incorporated and organized by the legislature of the State of Connecticut, and having its principal office at Hartford, in said State of Connecticut, respectfully shows that an action has been commenced against your petitioner on the first day of February, A. D. 1870, in which action Adam Schwenk, guardian of F. J. McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, are the plaintiffs, and your petitioner is the defendant; that the amount in controversy in said action exceeds five hundred dollars, exclusive of costs, the said action being brought to recover of your petitioner, defendant therein, the sum of five thousand dollars and interest upon a policy of insurance issued by your petitioner to Mary D. McDonough, insuring her husband, Anthony A. McDonough, against loss of life, to the amount of five thousand dollars, as appears by the pleadings in said action, and which policy of insurance and the renewals thereof your petitioner avers are annulled and made void by the
26 unauthorized acts of the said Anthony A. McDonough, and your petitioner avers that it is not liable in any sum upon said policy and renewals.

And your petitioner further shows that it has not yet entered its appearance in said action, and said action is still pending undetermined, by default of your petitioner or otherwise; and your petitioner further shows that your petitioner is a corporation created under and by virtue of the laws of the State of Connecticut, located, doing business, and having its principal office and place of business at the city of Hartford, in the State of Connecticut; and that your petitioner is a citizen of the State of Connecticut, and is not a citizen of Pennsylvania, and that, as your petitioner is informed and believes, Adam Schwenk, guardian as aforesaid, and Michael Dunn, guardian as aforesaid, the plaintiffs in said action, are citizens of the State of Pennsylvania, and that the place for the trial of said action, as stated in said summons and complaint, is in the county of Berks, in the State of Pennsylvania; wherefore your petitioner prays that the said action be removed for trial from the said court of common pleas of Berks County, State of Pennsylvania, into the next circuit court of the United States to be held in the city of Philadelphia, for the eastern district of Pennsylvania.

{ SEAL OF CORPORATION. } CONNECTICUT MUTUAL LIFE-INSURANCE CO.
By W. S. OLMSTEAD, *Sec'y.*

27 Woodbridge S. Olmstead, being duly sworn, says that he resides in the city of Hartford, and is the secretary of the Connecticut Mutual Life-Insurance Company, the petitioner in the foregoing petition; that said petitioner is an insurance corporation, created under and by virtue of the laws of the State of Connecticut, located, doing business, and having its principal office at Hartford, in the State of Connecticut; that he has heard read the foregoing petition and knows

the contents thereof, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes to be true.

Deponent further says that he has fully and fairly stated the case in this action to Henry C. Robinson, esq., the defendant's counsel in this action, who resides in the city of Hartford aforesaid, and that the defendant has a good and substantial defence in the said action upon the merits, as he is advised by said counsel after having stated the case therein to them as aforesaid, and verily believes.

Sworn and subscribed before me this 4th day of March, A. D. 1870.

{ SEAL OF COMMISSIONER. } W. EDGAR SIMONS,
Com'r for Pennsylvania.

28 (Endorsement.) 96. February term, 1870. Adam Schwenk, guardian, &c., and Michael Dunn, guardian, &c., vs. The Connecticut Mutual Life-Insurance Co. Petition for removal. Filed March 13, 1871.

And now, to wit, Mar. 11, 1871, court granted a rule to show cause why this case should not be removed into the circuit court of the United States.

By the court.

J. HAGEMAN, *A. L. Judge.*

GARRIGUES & RICHARDS,
Attys. for Plff.

29 *Copy of bond.*

Know all men by these presents that we, James Goodwin, of Hartford, Connecticut, and Edward Wallace & W. N. Coleman, of Reading, Berks County, Penna., are held and firmly bound unto Adam Schwenk, guardian of F. J. McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Adam Schwank and Michael Dunn, guardian, as aforesaid, or to their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made and done, we, and each of us, bind ourselves jointly and severally, our and each of our heirs, executors, and administrators, and every of them, firmly by these presents.

Sealed with our seals and dated the day of March, A. D. 1871.

Whereas a suit was brought in the court of common pleas of Berks Co., to , 96, February term, 1870, in which suit Adam Schwenk, guardian as aforesaid, and Michael Dunn, guardian as aforesaid, are plaintiffs, and The Connecticut Mutual Life-Insurance Company defendant,

30 And whereas application is about to be made by said defendant to remove said action for trial from said court of common pleas of Berks County into the next circuit court of the United States, to be held in the city of Philadelphia, for the eastern district of Pennsylvania:

Now the condition of this obligation is such, that if the said defendant shall enter in said circuit court of the United States, on the first day of the sessions thereof, copies of process in said action against them, and also shall appear in said circuit court of the United States, then

the above obligation to be of no effect; otherwise to be and remain in full force and virtue.

THE CONN. MUTUAL LIFE-INS. COMP'Y, [L. S.]
By JAMES GOODWIN, *Pres'd't.* [L. S.]
EDM. WALLACE, [L. S.]
W. N. COLEMAN. [L. S.]
{ SEAL OF CORPORATION. }

Sealed and delivered in presence of us—
W. S. OLMSTED.
H. C. HARLYES.

(Endorsement:) 96. February T., 1870. Adam Schwenk, guardian, &c., and Michael Dunn, guardian, &c., vs. The Connecticut Mutual
31 Life-Ins. Co. Bond for removal to circuit court, E. D. Pa. Filed March 13, 1871.

STATE OF PENNSYLVANIA,
Berks County, ss:

{ COURT OF COMMON PLEAS, BERKS COUNTY, PA., SEAL. } I, Geo. K. Levan, prothonotary of the court of common pleas of Berks County, do hereby certify that the above and foregoing is a true and correct copy of the record and proceedings in the above and foregoing case, wherein Adam Schwenk et al. are plaintiffs and the Connecticut Mutual Life-Ins. Co., defendants, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Reading, this 2nd day of August, A. D. 1872.

GEO. K. LEVAN,
Proth'y.

(Endorsed:) No. 13. April sess., 1872. Adam Schwank et al. vs. Conn. Mutual Life-Ins. Co. Certified copy of record, &c. Filed 3rd August, 1872.

32 And afterwards, to wit, on the 18th day of October A. D. 1873, on motion of L. C. Cleeman, esq., attorney for plaintiffs, the court order the following narr. to be filed, nunc pro tunc, as of September 5, 1872, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania, April sessions, 1872.

ADAM SCHWANK, GUARDIAN OF FERGUS JOSEPH McDonough & Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan,
vs.
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company. } No. 13.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The Connecticut Mutual Life-Insurance Company were summoned to answer Adam Schwank, guardian of Joseph Fergus McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and

Catharine Nolan, of a plea of trespass on the case in assumpsit; thereupon the said plaintiffs, by B. Frank Boyer, their attorney, complain: For that whereas a certain Mary D. McDonough heretofore, to wit, on the 26th day of March, A. D. 1867, at Reading, in the district aforesaid, caused to be made a certain writing or policy of assurance, purporting thereby and containing therein that in consideration of the sum of four hundred and twenty-one dollars and fifty cents to the said Connecticut Mutual Life-Insurance Company in hand paid by Mary D. McDonough, wife of Anthony A. McDonough, of Reading, Pa., and of the annual premium of four hundred twenty-one dollars and fifty cents to be paid on or before the 26th day of March in each year during the continuance of the said policy, did assure the life of Anthony A. McDonough, of Reading, in the county of Berks, State of Pennsylvania, for the sole use of the said Mary D. McDonough, in the amount of five thousand dollars for the term of the whole continuance of his life. And the said company did thereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay or cause to be paid, at the city of Hartford, the said sum insured to the assured, her executors, administrators, or assigns, for her sole use, within ninety days after due notice and proof of the death of the said Anthony A. McDonough, deducting therefrom all notes taken for premiums unpaid at that date; and in case of the death of the said Mary D. McDonough before the decease of the said Anthony A. McDonough, the amount of said insurance should be payable after her death to her children, for their use, or to their guardian, if under age, ninety days after notice and proof of the death of the said Anthony A. McDonough, as aforesaid; and also conditioned and agreed that if at any time after the payment of three premiums on said policy it should be surrendered while yet in force, the company will issue a paid-up non-forfeiture policy therefor for such an amount as the then present value of said policy would then purchase as a single premium; provided always, and it was therein declared to be the true intent and meaning of said policy, and the same was accepted by the assured upon the express conditions, that in case the said Anthony A. McDonough should die upon the seas, or should, without the consent of the said company previously obtained and endorsed upon said policy, pass by either sea or land beyond the settled limit of the United States, (excepting by land or on lakes and rivers into the settled limits of the British Provinces of the two Canadas, Nova Scotia, or New Brunswick;) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November; or shall, without such previous consent first endorsed, visit California or Oregon, or pass into the Territories of the United States lying west of the twenty-first meridian of longitude from Washington; or shall, without such previous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted;) or shall, without such previous consent thus endorsed, be personally employed as an engineer *of* fireman in charge of a steam-engine, or as fireman or brakeman upon a railroad, or as an officer, hand or servant of any steam-vessel, or in the manufacture or transportation of gunpowder; or in case he shall become so far intemperate as to impair his health, or induce delirium tremens, or shall die of his own hand or in a duel, or in con*fi*dence thereof, or by the hands of justice, or in the known violation of any law of the State or the United States, or of any government where he may be, the said policy should be void and of no effect.

36 And it was also understood and agreed to be true intent and meaning thereof, that if the proposals, answers, and declarations made by the said Mary D. McDonough, and bearing date the twenty-fifth day of March, 1867, and which were made part and parcel of the said policy as fully as if therein recited, and upon the faith of which said agreement was made, should be found in any respect untrue, then, and in such case, said policy should be null and void; or, in case the said assured should not pay the said annual premiums on or before the several days therein before mentioned for the payment thereof, then, and in every such case, the said company should not be liable to the payment of the sum insured or any part thereof, and said policy should cease and determine.

And it was further understood and agreed that the said policy should not take effect and become binding on said company until the premium above named should be actually paid to said company or to some one authorized by them to receive it.

And it was further agreed that in every case where this policy should cease or become or be null and void, all previous payments made
37 thereon, and all dividends, credits accruing therefrom, should be forfeited to the company as by the said writing or policy of assurance more fully appears.

And the said plaintiffs further say that the declarations, proposal, and answers in the said policy were as follows:

I, Mary D. McDonough, of Reading, county of Berks, State of Pennsylvania, being desirous of effecting an assurance with the Connecticut Mutual Life-Insurance Company in the sum of five thousand dollars upon the life of Anthony A. McDonough, of Reading, county of Berks, and State of Pennsylvania, during the term of life, do hereby declare that his age next birth-day will be sixty-two years; that he is in good health, of sober and temperate habits, and does usually enjoy good health, and that the following answers and statements are correct and true, in which I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of his health, habits of life, or condition which may render an assurance on his life more than usually hazardous, or with which the directors
38 of said company ought to be made acquainted.

And I do hereby declare that I have an interest in the life of said Anthony A. McDonough to the full amount of the said sum of five thousand dollars.

And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration, shall be the basis and form a part of the contract or policy between me and the said company, and that if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividends, credits which may accrue therefrom shall be forfeited to said company; and I further agree that the assurance hereby proposed shall not be binding on said company, and no policy shall attach until the amount of premiums, as stated therein, shall be paid to said company in the life-time of said assured.

Dated at Reading this 25th day of March, 1867.

(Signed) MARY D. McDONOUGH.
ANTHONY A. McDONOUGH.

Witness: EDWARD TILDEN.

39 *Questions and answers above referred to.*

1. Name & residence of the person for whose benefit this assurance is proposed.	Mary D. McDonough, Reading, Pa.
If wife or husband so state.	Wife of Anthony A. McDonough.
2. Name & residence of the person whose life is proposed to be insured. (See note as above.)	Anthony A. McDonough, Reading, Pa.
If wife or husband, father or mother, brother or sister of applicant, so state.	Husband of applicant.
3. Occupation of person whose life is proposed to be insured; & whether married or single.	Physician; married.
4. Place & date of the birth of the party whose life is to be insured, giving months & days.	Ireland. August 11, 1803.
5. Age next birth-day.	Sixty-two.
6. Is the party now, and has he always been, of temperate habits?	Yes.
7. Has the party resided out of the United States; and, if so, where, for what purpose and period, and what was the effect of such residence on his health?	Resided in Ireland previous to coming to the United States.
40 8. Has the party been vaccinated, or had the small-pox?	Yes; yes.
9. Has father or mother, brother or sister, of the party died or been afflicted with consumption or any other disease of the lungs, or insanity? If so, state full particulars of each case.	No.
How many brothers & sisters in all?	Six.
How many have died & of what disease?	One died of dropsy; the others did not come to this country; am not certain of what disease they died, but am sure it was not consumption.
What is the present health of the survivors?	
10. Has the party been, or was he, afflicted with fits, dropsy, or liver complaint, asthma, spitting of blood, gout, rheumatism, insanity, rupture, or fistula, & which?	No.
11. Has the party been afflicted with disease of the heart, of the urinary, and, if a female, of the uterine organs? If so, which?	No.
41 12. Has the party been afflicted during the last seven years with any severe or acute constitutional disease, & what?	No.
13. Is the party now afflicted	No.

with any disease or disorder, & what?	
14. Has the party ever met with any accidental or serious personal injury; &, if so, what was it?	No.
15. Name & residence of the party's usual medical attendant, or (if he has none) of some other medical person to be referred to for information as to his health.	Refers to Adam Schoener, M. D., as an acquaintance.
16. Name & residence of an intimate friend, to be referred to for similar information.	C. W. L. Hoffeditz, Reading, Pa.
17. Amount of insurance applied for, $5,000.	Five thousand dollars.
18. Term for which the insurance is desired & specified plan.	Life.
19. Has a previous proposal been made for insurance in this 42 or any other company; and, if so, was it accepted or not, and if accepted, for what amount?	Yes. Accepted for $5,000.
20. Is the party aware that any untrue or fraudulent allegation made in effecting the proposed assurance will render the policy void, and that all payment of premiums made thereon and divided credits accruing therefrom will be forfeited?	Yes.
(Signed)	ANTHONY A. McDONOUGH.

Witness: EDWIN TILDEN.

And there*fore* afterwards, to wit, on the fourth day of April, A. D. 1867, at the district aforesaid, the said Mary D. McDonough, at the special instance and request of the said defendants, then and there paid to the said defendants a certain sum of money, to wit, the sum of four hundred & twenty-one dollars and fifty cents, as a premium and reward for the insurance of the said sum of five thousand dollars upon 43 the live of the said Anthony A. McDonough, as in the said policy mentioned, for one year, to wit, from the 26th day of March, A. D. 1867, to the 26th day of March, A. D. 1868; and the said Mary D. McDonough afterwards, to wit, on the 6th day of March, A. D. 1868, at the county aforesaid, at the special instance and request of the said defendants, then and there paid unto the said defendants the further sum of four hundred & twenty-one dollars and fifty cents, as a premium for the renewal continuance of the said policy for insurance for the further term of one year from the 26th day of March, A. D. 1868, to the 26th day of March, A. D. 1869, as in the said policy of insurance provided.

And afterwards, to wit, on the 13th day of March, A. D. 1869, the said plaintiffs paid the further sum of four hundred and twenty-one dollars and fifty cents to the said defendants as a premium for the renewal and continuance of the said policy for the further term of one year from the 26th day of March, A. D. 1869, to the 26th day of March, A. D. 1870, as in the said policy of insurance provided. And the said

44 plaintiffs in fact say that the aforementioned declaration, and the said proposal and answers so referred to in said policy as aforesaid, so by the said Mary D. McDonough made as aforesaid, were in all respects true, to wit, in the district aforesaid.

And the said plaintiff further say that at the time of the making of the last-mentioned declaration and also at the time of the making of said last-mentioned policy of insurance & of the said last-mentioned promise and understanding of the said defendants as last aforesaid, the said Mary D. McDonough, and also at the time of the death of the said Anthony A. McDonough, as hereinafter mentioned, they, the said plaintiffs, were interested in the life of the said Anthony A. McDonough to a large amount, to wit, to the amount of all the monies by him or them insured thereon, to wit, in the district aforesaid; of all which the said defendants had notice. And the said plaintiffs further say that on or about the sixteenth day of April, A. D. 1868, the said Mary D. McDonough aforesaid died, leaving surviving her four children, to wit, Fergus Joseph McDonough, Theresa McDonough, Charles Nolan, and Catharine Nolan, all of whom are still in their minority; the said Fergus Joseph and Theresa having Adam Schwank for their guardian, and the
45 said Charles Nolan and Catharine Nolan having Michael Dunn for their guardian. And the said plaintiffs further say that afterwards, to wit, on or about the 12th day of April, A. D. 1869, in the district aforesaid, the said Anthony A. McDonough died; and the said plaintiffs further say that the decease of the said Anthony A. McDonough as aforesaid was afterwards, to wit, on or about the first day of May, A. D. 1869, in the district aforesaid, duly certified to the said defendants and satisfactory proof was produced to the said company by the said plaintiffs of the death of the said Anthony A. McDonough, as aforesaid, and although the said Mary D. McDonough had and said plaintiffs have in all things conformed themselves to, observed, performed, fulfilled, and kept all things in the said policy of insurance, and the said conditions, and the said stipulations contained, on their part or on the part of the said Mary D. McDonough to be observed and performed, according to the form and effect of the said policy of insurance and of the said proposals and conditions, and although ninety days after the decease of the said Anthony A. McDonough was duly certified to the said company, and after satisfactory proof was so produced of the death of the said An-
46 thony A. McDonough, as aforesaid, has long since elapsed, of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, in the district aforesaid, had notice, and were then & there requested by the said plaintiffs to pay them the said sum of five thousand dollars so insured as aforesaid, yet the said defendants, not regarding their said promises and undertaking so by them made as aforesaid, did nor would when they were so requested as aforesaid, or at any time before or since, pay the said sum of five thousand dollars or any part thereof, but have hitherto wholly neglected and refused so to do, & still neglect and refuse so to do, to wit, in the district aforesaid.

And whereas also the said defendants, to wit, on the day and year aforesaid, to wit, in the district aforesaid, were indebted to the said plaintiffs in the further sum of five thousand dollars like money for so much money by the said plaintiff before that time lent, advanced, paid, laid out, and expended to and for the use of the said defendants and at their like special instance and request.

And also in the further sum of five thousand dollars like money

47 for other money by the said defendants before that time had and received to and for the use of the said plaintiffs.

And also in the further sum of five thousand dollars like money for so much money then & there found to be due and owing from the said defendants to the said plaintiffs, and in arrear and unpaid, upon an account then & there stated between them. And being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, in the district aforesaid, promised the said plaintiff' to pay them the said several sums of money in this count mentioned when they, the said defendants, should be thereunto afterwards requested.

Nevertheless the said defendants, not regarding their said several promises and undertakings, have not paid the said several sums of money or any of them or any part thereof to the said plaintiffs, although often requested so to do, but the said defendants have hitherto neglected and refused and still do neglect and refuse to pay the same to the said plaintiffs, to the damage of the said plaintiffs ten thousand dollars; & therefore they bring suit, &c.

B. FRANK BOYER.
L. C. CLEEMAN.

48 And afterwards, to wit, on the 5th day of September, A. D. 1872, the plaintiffs, by their attorney, L. C. Cleeman, esq., file rule to plead as follows:

U. S. C. C., Apl. sess., '72.

ADAM SCHWENK, GUARDIAN, ET AL.,
vs.
THE CONNECTICUT MUTUAL INSURANCE COMPANY. } No. 13.

Enter rule upon defendants to plead in 14 days, or judgment sec. reg.
CLEEMAN, *for Plf.*

To clerk C. C.

(Endorsed:) 13. U. S. C. C., Apl. sess., '72. Schwank, &c., vs. The Connecticut Mutual Ins. Company. Rule to plead. Cleeman for plf. Filed Sept. 5, 1872.

49 And afterwards, to wit, on the 15th day of February, A. D. 1873, the defendants, by their attorney, J. Vaughan Darling, esq., file pleas, in the words following, to wit:

U. S. C. C. E. D. of Pa.

SCHWENCK ET AL.
v.
THE CONNECTICUT MUTUAL LIFE-INSURANCE Co.

The defendants plead "non est factum," "covenants performed"

1. And the defendants, by J. Vaughan Darling, their attorney, come and defend the wrong and injury when, &c., and say that the said plaintiff' ought not to have or maintain this aforesaid action thereof

against the defendants, because they say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants bring here into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments made
50 thereon, to wit, at the said city; and the defendants say that the said declarations in said application aver, in answer to question number 4 thereof, that the said Anthony A. McDonough, the insured, was born in Ireland on the eleventh day of August, 1805, whereas in truth and in fact the said Anthony A. McDonough was born at a period long anterior, to wit, in the year 1797; and this the said defendants are ready to verify. Wherefore they pray judgment, &c.

2. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that
51 the said declarations in said application contained aver, in answer to question number five, that the said Anthony A. McDonough, the insured, would be, on his next birthday, sixty-two years of age, whereas in truth and in fact the said Anthony A. McDonough was then of and upwards of the age of sixty-two, to wit, of the age of sixty-nine; and this the said defendants are ready to verify. Wherefore, &c.

And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 6, that the said Anthony A. McDonough, the insured,
52 was then and always had been of temperate habits, whereas in truth and in fact the said Anthony A. McDonough was then of intemperate habits; and this the defendants are ready to verify. Wherefore they pray judgment, &c.

4. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 6, that the said Anthony A. McDonough, the party insured, was then and had always been of temperate habits, whereas in truth and in fact the said Anthony
53 A. McDonough was then an habitual drunkard; and this the defendants are ready to verify. Wherefore they pray judgment, &c.

5. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments thereon made, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 6 thereof, that the said Anthony A. McDonough, the insured, was then and always been of temperate habits, whereas in truth and in fact the said Anthony A. McDonough had theretofore been of intemperate habits; and this the defendants are
54 ready to verify. Wherefore they pray judgment, &c.

6. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations made in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in the said application contained aver, in answer to question number 6 thereof, that the said Anthony A. McDonough, the insured, was then and always had been of temperate habits, whereas in truth and in fact the said Anthony A. McDonough had theretofore been an habitual drunkard; and this the defendants are ready to verify. Wherefore they pray judgment, &c.

55 7. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should make the policy of insurance null and void, and forfeit all payments made thereon, to wit, in the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 12 thereof, that the said Anthony A. McDonough, the insured, had not been afflicted during the last seven years with any severe or acute constitutional disease, whereas in truth and in fact the said Anthony A. McDonough had within the period been afflicted with a disease known as delirium tremens; and this the defendants are ready to verify. Wherefore they pray judgment, &c.

56 8. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 13 thereof, that the said Anthony A. McDonough, the insured, was not then afflicted with any disease or disorder, whereas in truth and in fact the said Anthony A. McDonough was then afflicted with a disease or disorder known as habitual drunken'ess; and this the defendants are ready to verify. Wherefore they pray judgment, &c.

57 9. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 15 thereof, that the said Anthony A. McDonough, the insured, referred to one Adam Schoener, M. D., as an acquaintance from whom information as to his health might be obtained; whereas, in truth and in fact, the said Anthony A. McDonough had a usual medical attendant; and this the defendants are ready to verify. Wherefore the' pray judgment, &c.

58 10. And for a further plea in this behalf the defendants say that the said policy of insurance was made in consideration of representations made in a certain application for insurance, which the defendants bring here into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers or any suppression of facts in regard to the health of the party insured therein made should render the policy null and void and forfeit all payments thereon made, to wit, at the said city; and the defendants say that the said declarations in said application contained aver in answer to question number 15 thereof a false and fraudulent answer, referring to Adam Schoener, M. D., as an acquaintance, thereby giving the defendants to understand that he then had and had had no family physician, whereby these defendants were deceived; whereas, in truth and in fact, the said Anthony A. McDonough, the insured, had a family physician, and this the defendants are ready to verify. Wherefore they pray judgment, &c.

59 11. And for a further plea in this behalf the defendants say that the plaintiffs ought not, &c., because they say that the said Mary D. McDonough was not at the time of the making of the said instrument or policy of insurance and from thence until the time of the death of the said Anthony A. McDonough interested in the life of the said Anthony A. McDonough to the amount insured in manner and form as set forth in the said declaration or to any amount whatever. Wherefore they pray judgment, &c.

12. And for a further plea in this behalf the defendants say that the plaintiffs ought not, &c., because they say that the said plaintiffs are not nor ever have been interested in the life of the said Anthony A. McDonough to the amount insured in manner and form as set forth in the said declaration or to any amount whatever. Wherefore they pray judgment, &c.

13. And they, by J. Vaughan Darling, their attorney, come and defend the wrong and injury, when, &c., and say that they do not

60 owe the said sum of money above demanded, or any part thereof, in manner, &c., because they say that said policy in declaration mentioned was obtained from said defendants by said Mary D. McDonough, and by others in collusion with her, by fraud, covin, and misrepresentation, to wit, at the city aforesaid; wherefore they, the said defendants, say that the said policy was and is null and void, and this, &c. Wherefore they pray judgment, &c.

J. VAUGHAN DARLING,
Atty. for Def'ts.

61 And afterwards, to wit, on the 7th day of March, A. D. 1873, the plaintiffs, by their attorney, L. C. Cleeman, esq., file their replication as follows, to wit:

U. S. C. C., E. D. of Pa., April sess., 1872.

SCHWANK ET AL.
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And the said pl'fs, as to the plea of the said def'ts firstly pleaded, say that the said pl'fs, by reason of anything by the said def'ts in that plea alleged, ought not to be barred from having or maintaining their aforesaid action against them, because they say that the said Anthony A. McDonough was not born in the year 1797; & this the pl'fs pray, &c.

And the said pl'fs, as to the plea, &c., secondly pleaded, say, &c., because they say that the said McDonough was not at the time of the application in said plea mentioned sixty-nine years of age and upwards; and this the pl'fs pray, &c.

And the said pl'fs, as to the plea, &c., thirdly pleaded, say, &c., because they say that the said McDonough was not, at the time aforesaid, of intemperate habits; and this the pl'fs pray, &c.

And the said pl'fs, as to the plea, &c., fourthly pleaded, say, &c., because they say that the said McDonough was not, at the time
62 last aforesaid, an habitual drunkard; and this the pl'fs pray, &c.

And the said pl'fs, as to the plea, &c., fifthly pleaded, say, &c., because they say that the said McDonough had not before the time last aforesaid been of intemperate habits; & this the pl'fs pray, &c. And the said pl'fs, as to the plea, &c., sixthly pleaded, say, &c., because they say the said McDonough had never, before the time last aforesaid, been an habitual drunkard; & this the pl'fs pray, &c.

And the said pl'fs, as to the plea, &c., seventhly pleaded, say, &c., because they say the said McDonough had not, within the seven years prior to the time last aforesaid, been afflicted with a disease called delirium tremens; & this the pl'fs pray, &c.

And the said pl'fs, as to the plea, &c., eighthly pleaded; say, &c., because they say that the said McDonough was not, at the time last aforesaid, with a disease or disorder known as habitual drunkenness; & this the pl'fs pray, &c.

And the said pl'f, as to the plea, &c., ninthly pleaded, says, &c., because they say the said McDonough had not a usual medical attendant; and this the pl'f prays, &c.

And the said pl'f, as to the plea, &c., tenthly pleaded, say, &c., because they say the said McDonough had not a family physician, and this the pl'f prays, &c.

63 And the said pl'f, as to the plea, &c., thirteenthly pleaded, say, &c., because they say that the policy of insurance in the said declaration mentioned was not obtained from the defendants by said Mary McDonough & others in collusion with her by fraud, covin, and misrepresentation; and this the pl'fs pray may be inquired of by the country.

L. C. CLEEMAN,
Atty for Pl'fs.

64 And afterwards, to wit, on the 16th day of April, A. D. 1874, the defendants, by their attorneys, M. Arnold & W. S. Price, esquires, by leave of court, file plea as follows:

C. C. U. S., April sess., 1872.

SCHWENK ET AL.
vs.
CONN. MUTUAL LIFE-INS. CO. } No. 13.

And now, April 16, 1874, by leave of court for that purpose had, the said defendant pleads non assumpsit.

M. ARNOLD,
W. S. PRICE,
Attys. for Deft.

(Endorsed:) No. 13, April sess., 1872. Schwenk et al *v.* Ins. Co., C. P. Plea. Filed 16th April, 1874. Arnold, Price.

65 And thereupon, afterwards, to wit, on the sixteenth day of April, A. D. 1874, a jury being called come, to wit:

1. Henry Kanaga.
2. Prentice P. Gustine.
3. Isaac McCleur.
4. Hugh Craig, junior.
5. Theodore Allen.
6. William Edge.
7. George J. Burkhardt.
8. Robert Burns.
9. James J. McDowell.
10. William B. Knowles.
11. Davis M. Lane.
12. Joseph W. Numbers.

Who are respectively sworn and affirmed to try the issue joined, &c.

And afterwards, to wit, on the twenty-second day of April, A. D. 1874, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find for the plaintiffs, and assess the damages at five thousand five hundred and seventy dollars, ($5,570,) with costs.

66 And afterwards, to wit, on the twenty-fifth day of April, A. D. 1874, M. Arnold and W. S. Price, esquires, attorneys for defendants, file motion & reasons for new trial, as follows:

C. C. U. S. April sess., 1872.

SCHWENCK ET AL.
vs.
CONN. MUTL. LIFE-INS. CO. } No. 13.

And now, to wit, April 25, 1874, the defendant, by its attorneys, comes and moves for a new trial, and assigns the following reasons:

1. Because the court permitted the plaintiffs to give evidence to prove that the age of Dr. Anthony A. McDonough was different from that stated in the proofs of death furnished the defendant, without first giving notice prior to the trial of their intention of offering such evidence.

2. Because the court permitted the plaintiffs to call William Nolan to correct his affidavit as to the age of Dr. McDonough filed with the proofs of death, without first giving notice prior to the trial of their intention to make such correction.

67 3. Because the court excluded the minute-book of Bernville Lodge, No. 122, I. O. O. F., which was offered by the defendant to show that Dr. McDonough did not give his true age in his application for insurance.

4. Because the verdict was against the weight of the evidence.

M. ARNOLD,
W. S. PRICE,
Attys. for Deft.

68 And afterwards, to wit, on the third day of October, A. D. 1874, motion for new trial is overruled, and the premises being seen, and by the court here fully understood, and mature deliberation being had thereon, it is considered and adjudged that the said Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, plaintiffs, do recover from the said The Connecticut Mutual Life-Insurance Company, defendant, their damages aforesaid found by the said jurors aforesaid, to wit, five thousand five hundred and seventy dollars, and also adjudged to the said Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, plaintiffs, by the court now here, for their said costs and charges, which said dai whole amount to the sum of

And the said defendants in mercy, &c.

69 And afterwards, to wit, on the third day of Oc 1874, the following bill of exceptions is filed:

Be it remembered that in the term or sessions of the month of April, A. D. 1872, came Adam Schwenk, guardian of Joseph Fergus McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, citizens of the State of Pennsylvania, into the circuit court of the United States of America for the eastern district of Pennsylvania, and impleaded The Connecticut Mutual Life-Insurance Company, a corporation created by the legislature of the State of Connecticut, in a certain plea of trespass on the case, &c., in which the said guardians, plaintiffs, declared as follows:

Narr.

In the circuit court of the United States for the eastern district of Pennsylvania, April sessions, 1872.

ADAM SCHWANK, GUARDIAN OF FERGUS JOseph McDonough & Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan,
vs.
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company.
} No. 13.

70 EASTERN DISTRICT OF PENNSYLNANIA, *ss:*

The Connecticut Mutual Life-Insurance Company were summoned to answer Adam Schwank, guardian of Joseph Fergus McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, of a plea of trespass on the case in assumpsit. Thereupon, the said plaintiffs, by B. Frank Boyer, their attorney, complain: for that whereas a certain Mary D. McDonough, heretofore, to wit, on the 26th day of March, A. D. 1867, at Reading, in the district aforesaid, caused to be made a certain writing or policy of assurance, purporting thereby and containing therein that in consider-

C. C. U. S., April sess., 1872.

SCHWENK ET AL.
vs.
CONN. MUTUAL LIFE-INS. CO. } No. 13.

And now, April 16, 1874, by leave of court for that purpose had, the said defendant pleads non assumpsit.

M. ARNOLD,
W. S. PRICE,
Attys. for Deft.

(Endorsed:) No. 13, April sess., 1872. Schwenk et al *v.* Ins. Co., C. P. Plea. Filed 16th April, 1874. Arnold, Price.

65 And thereupon, afterwards, to wit, on the sixteenth day of April, A. D. 1874, a jury being called come, to wit:

1. Henry Kanaga.
2. Prentice P. Gustine.
3. Isaac McCleur.
4. Hugh Craig, junior.
5. Theodore Allen.
6. William Edge.
7. George J. Burkhardt.
8. Robert Burns.
9. James J. McDowell.
10. William B. Knowles.
11. Davis M. Lane.
12. Joseph W. Numbers.

Who are respectively sworn and affirmed to try the issue joined, &c.

And afterwards, to wit, on the twenty-second day of April, A. D. 1874, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find for the plaintiffs, and assess the damages at five thousand five hundred and seventy dollars, ($5,570,) with costs.

66 And afterwards, to wit, on the twenty-fifth day of April, A. D. 1874, M. Arnold and W. S. Price, esquires, attorneys for defendants, file motion & reasons for new trial, as follows:

C. C. U. S. April sess., 1872.

SCHWENCK ET AL.
vs.
CONN. MUTL. LIFE-INS. CO. } No. 13.

And now, to wit, April 25, 1874, the defendant, by its attorneys, comes and moves for a new trial, and assigns the following reasons:

1. Because the court permitted the plaintiffs to give evidence to prove that the age of Dr. Anthony A. McDonough was different from that stated in the proofs of death furnished the defendant, without first giving notice prior to the trial of their intention of offering such evidence.

2. Because the court permitted the plaintiffs to call William Nolan to correct his affidavit as to the age of Dr. McDonough filed with the proofs of death, without first giving notice prior to the trial of their intention to make such correction.

67 3. Because the court excluded the minute-book of Bernville Lodge, No. 122, I. O. O. F., which was offered by the defendant to show that Dr. McDonough did not give his true age in his application for insurance.

4. Because the verdict was against the weight of the evidence.

M. ARNOLD,
W. S. PRICE,
Attys. for Deft.

68 And afterwards, to wit, on the third day of October, A. D. 1874, motion for new trial is overruled, and the premises being seen, and by the court here fully understood, and mature deliberation being had thereon, it is considered and adjudged that the said Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, plaintiffs, do recover from the said The Connecticut Mutual Life-Insurance Company, defendant, their damages aforesaid found by the said jurors aforesaid, to wit, five thousand five hundred and seventy dollars, and also adjudged to the said Adam Schwank, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, plaintiffs, by the court now here, for their said costs and charges, which said damages in the whole amount to the sum of

And the said defendants in mercy, &c.

69 And afterwards, to wit, on the third day of October, A. D. 1874, the following bill of exceptions is filed:

Be it remembered that in the term or sessions of the month of April, A. D. 1872, came Adam Schwenk, guardian of Joseph Fergus McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, citizens of the State of Pennsylvania, into the circuit court of the United States of America for the eastern district of Pennsylvania, and impleaded The Connecticut Mutual Life-Insurance Company, a corporation created by the legislature of the State of Connecticut, in a certain plea of trespass on the case, &c., in which the said guardians, plaintiffs, declared as follows:

Narr.

In the circuit court of the United States for the eastern district of Pennsylvania, April sessions, 1872.

ADAM SCHWANK, GUARDIAN OF FERGUS JOSEPH McDONOUGH & THERESA McDONOUGH, and MICHAEL DUNN, guardian of CHARLES NOLAN and CATHARINE NOLAN,	No. 13.
vs.	
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company.	

70 EASTERN DISTRICT OF PENNSYLNANIA, *ss:*

The Connecticut Mutual Life-Insurance Company were summoned to answer Adam Schwank, guardian of Joseph Fergus McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, of a plea of trespass on the case in assumpsit. Thereupon, the said plaintiffs, by B. Frank Boyer, their attorney, complain: for that whereas a certain Mary D. McDonough, heretofore, to wit, on the 26th day of March, A. D. 1867, at Reading, in the district aforesaid, caused to be made a certain writing or policy of assurance, purporting thereby and containing therein that in consider-

ation of the sum of four hundred and twenty-one dollars and fifty cents, to the said Connecticut Mutual Life-Insurance Company in hand paid by Mary D. McDonough, wife of Anthony A. McDonough, of Reading, Pa., and of the annual premium of four hundred twenty-one dollars and fifty cents, to be paid on or before the 26th day of March in each year during the continuance of the said policy, did assure the life of Anthony A. McDonough, of Reading, in the county of Berks, State of Pennsylvania, for the sole use of the said Mary D. McDonough, in the amount of five thousand dollars, for the term of the whole continuance of his
71 life. And the said company did thereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay or cause to be paid, at the city of Hartford, the said sum insured to the assured, her executors, administrators, or assigns, for her sole use, within ninety days after due notice and proof of the death of the said Anthony A. McDonough, deducting therefrom all notes taken for premiums, unpaid at that date. And in case of the death of the said Mary D. McDonough before the decease of the said Anthony A. McDonough the amount of said insurance should be payable after her death to her children for their use, or to their guardian if under age, ninety days after notice and proof of the death of the said Anthony A. McDonough as aforesaid. And also conditioned and agreed that, if at any time after the payment of three premiums on said policy it should be surrendered while yet in force, the company will issue a paid-up non-forfeiture policy therefor, for such an amount as the then present value of said policy would then purchase as a single premium; provided always, and it was therein declared to be the true intent and meaning of said policy, and the same was accepted by the assured upon the
72 express conditions, that in case the said Anthony A. McDonough should die upon the seas, or should, without the consent of the said company previously obtained and endorsed upon said policy, pass by either sea or land beyond the settled limits of the United States, (excepting by land or on lakes and rivers into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, or shall, without such previous consent first endorsed, visit California or Oregon, or pass into the Territories of the United States lying west of the twenty-first meridian of longitude from Washington, or shall, without such previous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted,) or shall, without such previous consent thus endorsed, be personally employed as an engineer *of* fireman in charge of a steam-engine, or as fireman or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, or in case he shall become so far intemperate as to impair his health or induce delirium tremens, or shall die of his own hand,
73 or in a duel, or in con*fid*ence thereof, or by the hands of justice, or in the known violation of any law of the State or the United States, or of any government where he may be, the said policy should be void and of no effect.

And it was also understood and agreed to be true intent and meaning thereof that if the proposals, answers, and declarations made by the said Mary D. McDonough, and bearing date the twenty-fifth day of March, 1867, and which were made part and parcel of the said policy as fully as if therein recited, and upon the faith of which said agreement was made, should be found in any respect untrue, then and in such case

said policy should be null and void; or in case the said assured should not pay the said annual premiums on or before the several days thereinbefore mentioned for the payment thereof, then and in every such case the said company should not be liable to the payment of the sum insured, or any party thereof, and said policy should cease and determine.

And it was further understood and agreed that the said policy should not take effect and become binding on said company until the premium above named should be actually paid to said company or to some
74 one authorized by them to receive it. And it was further agreed that in every case where this policy should cease or become or be null and void, all previous payments made thereon, and all dividends, credits, accruing therefrom should be forfeited to the company as by the said writing or policy of assurance more fully appears.

And the said plaintiffs further say that the declaration, proposal, and answers in the said policy were as follows:

I, Mary D. McDonough, of Reading, county of Berks, State of Pennsylvania, being desirous of effecting an assurance with the Connecticut Mutual Life-Insurance Company, in the sum of five thousand dollars, upon the life of Anthony A. McDonough, of Reading, county of Berks, and State of Pennsylvania, during the term of life, do hereby declare that his age next birthday will be sixty-two years; that he is in good health, of sober and temperate habits, and does usually enjoy good health, and that the following answers and statements are correct and true, in which I have not concealed, with'eld, or misrepresented any material circumstance in relation to the past or present state of his health, habits of life, or condition which may render an assur-
75 ance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted.

And I do hereby declare that I have an interest in the life of said Anthony A. McDonough to the full amount of the said sum of five thousand dollars.

And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration shall be the basis and form a part of the contract or policy between me and the said company, and that, if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend, credits, which may accrue therefrom shall be forfeited to said company; and I further agree that the assurance hereby proposed shall not be binding on said company, and no policy shall attach until the amount of premium as stated therein shall be paid to said company in the life-time of said assured.

Dated at Reading, this 25th day of March, 1867.

(Signed) MARY D. McDONOUGH.
ANTHONY A. McDONOUGH.

Witness: EDWARD TILDEN.

76 *Questions and answers above referred to.*

1. Name & residence of the person for whose benefit this assurance is proposed. If wife or husband, so state.	Mary D. McDonough, Reading, Pa., wife of Anthony A. McDonough.
2. Name & residence of the person whose life is proposed to be insured.	Anthony A. McDonough, Reading, Pa.
See note as above.	

If wife or husband, father or mother, brother or sister of applicant, so state.	Husband of applicant.
3. Occupation of person whose life is proposed to be insured & whether married or single.	Physician. Married.
4. Place & date of the birth of the party whose life is to be insured, giving months & days.	Ireland, August 11, 1803.
5. Age next birthday.	Sixty-two.
6. Is the party now and has he always been of temperate habits.	Yes.
7. Has the party resided out of the United States, and, if so, where, for what purpose and period, and what was the effect of such residence on his health?	Resided in Ireland previous to coming to the United States.
77 8. Has the party been vaccinated or had the small-pox?	Yes. Yes.
9. Has father or mother, brother or sister of the party died or been afflicted with consumption or ony other disease of the lungs or insanity? If so, state full particulars of each case.	No.
How many brothers & sisters in all?	Six.
How many have died & of what disease?	One died of dropsy. The others did not come to this country; am not certain of what disease they died, but am sure it was not consumption.
What is the present health of the survivors?	
10. Has the party been or was he afflicted with fits, dropsy, or liver-complaint, asthma, spitting of blood, gout, rheumatism, insanity, rupture, or fistula, & which?	No.
11. Has the party been afflicted with disease of the heart, of the urinary and, if a female, of the uterine organs? If so, which?	No.
78 12. Has the party been afflicted during the last seven years with any severe or acute constitutional disease & what?	No.
13. Is the party now afflicted with any disease or disorder, & what?	No.
14. Has the party ever met with any accidental or serious personal injury; &, if so, what was it?	Refers to Adam Schoener, M. D., as an acquaintance.
15. Name & residence of the party's usual medical attendant, or (if he has none) of some other medical person to be referred to for information as to his health.	

16. Name & residence of an intimate friend to be referred to for similar information.	C. W. L. Hoffeditz, Reading, Pa.
17. Amount of insurance applied for $5,000.	Five thousand dollars.
18. Term for which the insurance is desired & specified plan.	Life.
19. Has a previous proposal been made for insurance in this or any other company; and, if so, was it accepted or not, and, if accepted, for what amount?	Yes; accepted for $5,000.
79 20. Is the party aware that any untrue or fraudulent allegation made in effecting the proposed assurance will render the policy void and that all payment of premiums made thereon and divided credits accruing therefrom will be forfeited?	Yes.

(Signed) ANTHONY C. McDONOUGH.

Witness: EDWIN TILDEN.

And therefore, afterwards, to wit, on the fourth day of April, A. D 1867, at the district aforesaid, the said Mary D. McDonough, at the special instance and request of the said defendants, then and there paid to the said defendants a certain sum of money, to wit, the sum of four hundred & twenty-one dollars and fifty cents, as a premium and reward for the insurance of the said sum of five thousand dollars upon the life of the said Anthony A. McDonough, as in the said policy mentioned, for one year, to wit, from the 26th day of March, A. D. 1867, to the 26th day of March, A. D. 1868. And the said Mary D. McDonough afterwards, to wit, on the 6th day of March, A. D. 1868, at the county aforesaid, at the special instance and request of the said defendants, then and there paid unto the said defendants the further sum of four hundred & twenty-one dollars and fifty cents as a premiun for the renewal,
80 continuance, of the said policy for insurance for the further term of one year from the 26th day of March, A. D. 1868, to the 26th day of March, A. D. 1869, as in the said policy of insurance provided.

And afterwards, to wit, on the 13th day of March, A. D. 1869, the said plaintiffs paid the further sum of four hundred & twenty-one dollars and fifty cents to the said defendants as a premium for the renewal and continuance of the said policy for the further term of one year from the 26th day of March, A. D. 1869, to the 26th day of March, A. D. 1870, as in the said policy of insurance provided.

And the said plaintiffs in fact say that the aforementioned declaration and the said proposal and answers so referred to in said policy as aforesaid, so by the said Mary D. McDonough made as aforesaid, were in all respects true, to wit, in the district aforesaid. And the said plaintiffs further say that at the time of making of the last-mentioned declaration, and also at the time of the making of said last-mentioned policy of insurance, & of the said last-mentioned promise and understanding of the said defendants as last aforesaid, the said Mary D. McDonough, and also at the time of the death of the said Anthony A. McDonough, as hereinafter mentioned, they the said plaintiffs were interested

81 in the life of the said Anthony A. McDonough to a large amount, to wit, to the amount of all the monies by him or them insured thereon, to wit, in the district aforesaid, of all which the said defendants had notice.

And the said plaintiffs further say that on or about the sixteenth day of April, A. D. 1868, the said Mary D. McDonough aforesaid died leaving surviving her four children, to wit, Fergus Joseph McDonough, Theresa McDonough, Charles Nolan, and Catharine Nolan, all of whom are still in their minority, the said Fergus Joseph and Theresa having Adam Schwank for their guardian and the said Charles Nolan and Catharine Nolan having Michael Dunn for their guardian.

And the said plaintiffs further say that afterwards, to wit, on or about the 12th day of April, A. D. 1869, in the district aforesaid, the said Anthony A. McDonough died.

And the said plaintiffs further say that the decease of the said Anthony A. McDonough as aforesaid was afterwards, to wit, on or about the first day of May, A. D. 1869, in the district aforesaid, duly certified to the said defendants, and satisfactory proof was produced to the said company by the said plaintiffs of the death of the said Anthony A. McDonough as aforesaid, and although the said Mary D. McDonough

82 had and said plaintiffs have in all things conformed themselves to, observed, performed, fulfilled, and kept all things in the said policy of insurance and the said conditions, and the said stipulations contained on their part or on the part of the said Mary D. McDonough to be observed and performed, according to the form and effect of the said policy of insurance and of the said proposals and conditions, and, although ninety days after, the decease of the said Anthony A. McDonough was duly certified to the said company, and after satisfactory proof was so produced of the death of the said Anthony A. McDonough as aforesaid has long since elapsed, of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, in the district aforesaid, had notice and were then & there requested by the said plaintiffs to pay them the said sum of five thousand dollars, so insured as aforesaid, yet the said defendants, not regarding their said promises and undertaking so by them made as aforesaid, did, nor would when they were so requested as aforesaid, or at any time before or since, pay the said sum of five thousand dollars or any part thereof, but have hitherto wholly neglected and refused so to do & still neglect and refuse so to do, to wit, in the district aforesaid.

83 And whereas also the said defendants, to wit, on the day and year aforesaid, to wit, in the district aforesaid, were indebted to the said plaintiffs in the further sum of five thousand dollars like money for so much money by the said plaintiffs before that time lent, advanced, paid, laid out, and expended to and for the use of the said defendants, and at their like special instance and request;

And also in the further sum of five thousand dollars like money for other money by the said defendants before that time had and received to and for the use of the said plaintiffs;

And also in the further sum of five thousand dollars like money for so much money then & there found to be due and owing from the said defendants to the said plaintiffs, and in arrear and unpaid upon an account then & there stated between them; and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, in the district aforesaid, promised the said plaintiffs to pay them the said several sums of money in this count mentioned when they, the said defendants, should be thereunto afterwards

requested. Nevertheless, the said defendants, not regarding their said several promises and undertakings, have not paid the said several sums of money, or any of them, or any part thereof, to the said plaintiffs, although often requested so to do; but the said defendants have hitherto neglected and refused, and still do neglect and refuse, to pay the same to the said plaintiffs, to the damage of the said plaintiffs ten thousand dollars; wherefore they bring suit, &c.

B. FRANK BOYER,
L. C. CLEEMAN,
Atty's for Plff.

84 And the said company, defendant, pleaded as follows:

U. S. C. C., E. D. of Pa.

SCHWENCK ET AL.
v.
THE CONNECTICUT MUTUAL LIFE-INSURANCE Co.

The defendants plead "non est factum," "covenants performed."

1. And the defendants, by J. Vaughan Darling, their attorney, come and defend the wrong and injury when, &c., and say that the said plaintiff ought not to have or maintain this aforesaid action thereof against the defendants, because they say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts
85 in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said applications aver, in answer to question number 4 thereof, that the said Anthony A. McDonough, the insured, was born in Ireland on the 11th day of August, 1805, whereas, in truth and in fact, the said Anthony A. McDonough was born at a period long anterior, to wit, in the year 1797; and this the said defendants are ready to verify. Wherefore they pray judgment, &c.

2. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void and forfeit
86 payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number five, that the said Anthony A. McDonough, the insured, would be, on his next birth-day, sixty-two years of age; whereas, in truth and in fact, the said Anthony A. McDonough was then of and upwards of the age of sixty-nine; and this the said defendants are ready to verify; wherefore, &c.

3. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March,

1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say
87 that the said declarations in said application contained aver, in answer to question number 6, that the said Anthony A. McDonough, the insured, was then and always had been of temperate habits; whereas, in truth and in fact, the said Anthony A. McDonough was then of intemperate habits; and this the defendants are ready to verify; wherefore they pray judgment, &c.

And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer
88 to said question number 6, that the said Anthony A. McDonough, the party insured, was then, and had always been, of temperate habits; whereas, in truth and in fact, the said Anthony A. McDonough was then an habitual drunkard; and this the defendants are ready to verify; wherefore they pray judgment, &c.

5. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments thereon made, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 6 thereof, that the said Anthony A. McDonough,
89 the insured, was then, and always had been, of temperate habits; whereas, in truth and in fact, the said Anthony A. McDonough had theretofore been of intemperate habits; and this the defendants are ready to verify; wherefore they pray judgment, &c.

6. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations made in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments made thereon, to-wit, at the said city; and the defendants say that the said declarations in the said application contained aver, in answer to question number 6 thereof, that the said Anthony A. McDonough, the insured, was then and always had been of temperate habits;
90 whereas, in truth and in fact, the said Anthony A. McDonough had theretofore been an habitual drunkard; and this the defendants are ready to verify: wherefore they pray judgment, &c.

7. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March,

1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should make the policy of insurance null and void, and forfeit all payments made thereon, to wit, in the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 12 thereof, that the said Anthony A. McDonough, the insured, had not been afflicted during the last seven
91 years with any severe or acute constitutional disease; whereas, in truth and in fact, the said Anthony A. McDonough had, within the period, been afflicted with a disease known as delirium tremens; and this the defendants are ready to verify; wherefore they pray judgment, &c.

8. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of the representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to question number 13 thereof, that the said Anthony A. McDonough,
92 the insured, was not then afflicted with any disease or disorder; whereas, in truth and in fact, the said Anthony A. McDonough was then afflicted with a disease or disorder known as habitual drunkenness; and this the defendants are ready to verify; wherefore they pray judgment, &c.

9. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of representations contained in a certain application for insurance, which the defendants here bring into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments made thereon, to wit, at the said city; and the defendants say that the said declarations in said application contained aver, in answer to
93 question number 15 thereof, that the said Anthony A. McDonough, the insured, referred to one Adam Schoener, M. D., as an acquaintance from whom information as to his health might be obtained; whereas, in truth and in fact, the said Anthony A. McDonough had a usual medical attendant; and this the defendants are ready to verify; wherefore they pray judgment, &c.

10. And, for a further plea in this behalf, the defendants say that the said policy of insurance was made in consideration of representations made in a certain application for insurance, which the defendants bring here into court, bearing date the twenty-fifth day of March, 1867, and upon condition that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party insured therein made, should render the policy null and void, and forfeit all payments thereon made, to wit, at the said city; and the defendants say that the said declarations, in said application contained, aver, in answer to
94 question number 15 thereof, a false and fraudulent answer, referring to Adam Schoener, M. D., as an acquaintance, thereby giving the defendants to understand that he then had and had had no family physician, whereby these defendants were deceived; whereas, in truth and in fact, the said Anthony A. McDonough, the insured, had a

family physician; and this the defendants are ready to verify; wherefore they pray judgment, &c.

11. And, for a further plea in this behalf, the defendants say that the plaintiffs ought not, &c., because they say that the said Mary D. McDonough was not, at the time of the making of the said instrument or policy of insurance, and from thence until the time of the death of the said Anthony A. McDonough, interested in the life of the said Anthony A. McDonough to the amount insured in manner and form as set forth in the said declaration, or to any amount whatever; wherefore they pray judgment, &c.

12. And, for a further plea in this behalf, the defendants say that
95 the plaintiffs ought not, &c., because they say that the said plaintiffs are not nor ever have been interested in the life of the said Anthony A. McDonough to the amount insured in manner and form as set forth in the said declaration, or to any amount whatever; wherefore they pray judgment, &c.

13. And they, by J. Vaughan Darling, their attorney, come and defend the wrong and injury, when, &c., and say that they do not owe the said sum of money above demanded, or any part thereof, in manner, &c., because they say that said policy in declaration mentioned was obtained from said defendants by said Mary D. McDonough, and by others in collusion with her, by fraud, covin, and misrepresentation, to wit, at the city aforesaid; wherefore they, the said defendants, say that the said policy was and is null and void, and this, &c.; wherefore they pray judgment, &c.

J. VAUGHAN DARLING.
Atty. for Def'd'ts.

And thereupon issue was joined between them.

96 And afterwards, to wit, at a session of said court, held at the city aforesaid, before the honorable John Cadwalader, one or the judges of said court, held at the city of Philadelphia, within the said district, on the sixteenth day of April, A. D. 1874, the aforesaid issue between the said parties came on to be tried by a jury of the said district, for that purpose duly impannelled, as follows:

1. Henry Kanaga.
2. Prentice P. Gustine.
3. Isaac McCleur.
4. Hugh Craig, junior.
5. Theodore Allen.
6. William Edge.
7. George J. Burkhardt.
8. Robert Burns.
9. James J. McDowell.
10. William B. Knowles.
11. Davis M. Lane.
12. Joseph W. Numbers.

At which day came as well the said plaintiffs as the said defendants, by their respective attorneys, and the jurors of the jury aforesaid impanneled to try the said issues being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiffs, to maintain the issue on their part, offered in evidence the certificates of
97 their appointment as guardians by the orphans' court of Berks County, Pennsylvania, and called—

Walter H. Tilden, who, being duly sworn, testified that the signatures to the policy in suit are genuine, also the receipts for premiums attached thereto; and then offered said policy and receipts, and the application upon which it was issued in evidence, as follows:

98 THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY OF HARTFORD, CONN.

* *Declaration.*

I, Mary D. McDonough of Reading, county of Berks, State of Pennsylvania, being derirous of effecting an assurance with the Connecticut Mutual Life-Insurance Co., in the sum of five thousand dollars, upon the † life of Anthony A. McDonough, of Reading, county of Berks, and State of Pennsylvania, during the ‡ term of life, do hereby declare that his age next birthday will be sixty-two years; that he is now in good health, of sober and temperate habits, and do usually enjoy good health; and is not addicted to any vicious habits tending to shorten life; and that the following answers and statements are correct and true, in which I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of his health, habits of life, or condition, which may render an assurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted. And I do hereby declare that I have an interest in the life of the said Anthony A. McDonough to the full amount of the said sum of five thousand dollars.

And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration shall be a warranty, and the basis and form a part of the contract or policy between me and the said company; and that if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend-credits which may accrue therefrom, shall be forfeited to said company; and I further agree that the assurance hereby proposed shall not be binding on said company, and no policy shall attach until the amount of the premium, as stated therein, shall be paid in full to said company in the life-time of said assured.

Dated at Reading, this 25th day of March, 1867.

‖ (Signed) MARY D. McDONOUGH.
ANTHONY A. McDONOUGH.

Witness: EDWIN TILDEN.

Questions and answers above referred to.

1. Name and residence of the person for whose benefit the assurance is proposed.¶ (Give Christian names in full, and plainly written.) If wife or husband, so state.—Mary D. McDonough, Reading, Pa. Wife of Anthony A. McDonough.

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*This declaration should be made and signed by the person in whose name and for whose benefit the policy is desired. If a wife insures a husband, it should be made in her name, and both should sign it and the answers to the questions below.

† Insert "my own," if assurance is proposed on the party's own life; if on another's life, insert the person's name.

‡ "Whole term of life," or "term of three, five, or seven, &c., years.

‖ In signing, write the Christian name in full.

¶ The first two questions will have the same answers when the applicant insures his own life; different answers if he insures the life of another person. The names should be plainly written and the residence given in full. All the blanks and certificates should be properly filled before sending to the office.

family physician; and this the defendants are ready to verify; wherefore they pray judgment, &c.

11. And, for a further plea in this behalf, the defendants say that the plaintiffs ought not, &c., because they say that the said Mary D. McDonough was not, at the time of the making of the said instrument or policy of insurance, and from thence until the time of the death of the said Anthony A. McDonough, interested in the life of the said Anthony A. McDonough to the amount insured in manner and form as set forth in the said declaration, or to any amount whatever; wherefore they pray judgment, &c.

12. And, for a further plea in this behalf, the defendants say that
95 the plaintiffs ought not, &c., because they say that the said plaintiffs are not nor ever have been interested in the life of the said Anthony A. McDonough to the amount insured in manner and form as set forth in the said declaration, or to any amount whatever; wherefore they pray judgment, &c.

13. And they, by J. Vaughan Darling, their attorney, come and defend the wrong and injury, when, &c., and say that they do not owe the said sum of money above demanded, or any part thereof, in manner, &c., because they say that said policy in declaration mentioned was obtained from said defendants by said Mary D. McDonough, and by others in collusion with her, by fraud, covin, and misrepresentation, to wit, at the city aforesaid; wherefore they, the said defendants, say that the said policy was and is null and void, and this, &c.; wherefore they pray judgment, &c.

J. VAUGHAN DARLING.
Atty. for Def'd'ts.

And thereupon issue was joined between them.

96 And afterwards, to wit, at a session of said court, held at the city aforesaid, before the honorable John Cadwalader, one or the judges of said court, held at the city of Philadelphia, within the said district, on the sixteenth day of April, A. D. 1874, the aforesaid issue between the said parties came on to be tried by a jury of the said district, for that purpose duly impannelled, as follows:

1. Henry Kanaga.
2. Prentice P. Gustine.
3. Isaac McCleur.
4. Hugh Craig, junior.
5. Theodore Allen.
6. William Edge.
7. George J. Burkhardt.
8. Robert Burns.
9. James J. McDowell.
10. William B. Knowles.
11. Davis M. Lane.
12. Joseph W. Numbers.

At which day came as well the said plaintiffs as the said defendants, by their respective attorneys, and the jurors of the jury aforesaid impanneled to try the said issues being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiffs, to maintain the issue on their part, offered in evidence the certificates of
97 their appointment as guardians by the orphans' court of Berks County, Pennsylvania, and called—

Walter H. Tilden, who, being duly sworn, testified that the signatures to the policy in suit are genuine, also the receipts for premiums attached thereto; and then offered said policy and receipts, and the application upon which it was issued in evidence, as follows:

98 THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY OF HARTFORD, CONN.

* *Declaration.*

I, Mary D. McDonough of Reading, county of Berks, State of Pennsylvania, being derirous of effecting an assurance with the Connecticut Mutual Life-Insurance Co., in the sum of five thousand dollars, upon the † life of Anthony A. McDonough, of Reading, county of Berks, and State of Pennsylvania, during the ‡ term of life, do hereby declare that his age next birthday will be sixty-two years; that he is now in good health, of sober and temperate habits, and do usually enjoy good health; and is not addicted to any vicious habits tending to shorten life; and that the following answers and statements are correct and true, in which I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of his health, habits of life, or condition, which may render an assurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted. And I do hereby declare that I have an interest in the life of the said Anthony A. McDonough to the full amount of the said sum of five thousand dollars.

And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration shall be a warranty, and the basis and form a part of the contract or policy between me and the said company; and that if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend-credits which may accrue therefrom, shall be forfeited to said company; and I further agree that the assurance hereby proposed shall not be binding on said company, and no policy shall attach until the amount of the premium, as stated therein, shall be paid in full to said company in the life-time of said assured.

Dated at Reading, this 25th day of March, 1867.

‖ (Signed) MARY D. McDONOUGH.
ANTHONY A. McDONOUGH.

Witness: EDWIN TILDEN.

Questions and answers above referred to.

1. Name and residence of the person for whose benefit the assurance is proposed.¶ (Give Christian names in full, and plainly written.) If wife or husband, so state.—Mary D. McDonough, Reading, Pa. Wife of Anthony A. McDonough.

---

*This declaration should be made and signed by the person in whose name and for whose benefit the policy is desired. If a wife insures a husband, it should be made in her name, and both should sign it and the answers to the questions below.

† Insert "my own," if assurance is proposed on the party's own life; if on another's life, insert the person's name.

‡ "Whole term of life," or "term of three, five, or seven, &c., years.

‖ In signing, write the Christian name in full.

¶ The first two questions will have the same answers when the applicant insures his own life; different answers if he insures the life of another person. The names should be plainly written and the residence given in full. All the blanks and certificates should be properly filled before sending to the office.

2. Name and residence of the person whose life is proposed to be insured. (See note as above.)—Anthony A. McDonough, Reading, Pa.

If wife or husband, father, mother, brother, or sister of applicant, so state.—Husband of applicant.

3. Occupation of person whose life is proposed to be insured, and whether married or single.—Physician; married.

4. Place and date of birth of the party whose life is to be insured, giving months and days.—Ireland, August 11, 1805.

5. Age next birthday.—Sixty-two.

6. Is the party now and has he always been of temperate habits?—Yes.

7. Has the party resided out of the United States; and, if so, where, for what purpose and period, and what was the effect of such residence on his health?—Resided in Ireland previous to coming to the United States.

8. Has the party been vaccinated or had the small-pox?—Yes; yes.

9. Has father, mother, brother, or sister of the party died or been afflicted with consumption or any other disease of the lungs, or insanity? If so, state full particulars of each case.§—No.

How many brothers and sisters in all?—Six.

How many have died, and of what disease?—One died of dropsy. The others did not come to this country, and am not certain of what disease they died; but am sure it was not consumption.

What is the present health of the survivors?

10. Has the party been, or is he now, afflicted with fits, dropsy, liver complaint, asthma, spitting of blood, gout, rheumatism, insanity, rupture or fistula, and which?—No.

11. Has the party been afflicted with disease of the heart, of the urinary, and, if a female, of the uterine organs? If so, which?—No.

12. Has the party been afflicted during the past seven years with any severe or acute constitutional disease, and what?—No.

13. Is the party now afflicted with any disease or disorder, and what?—No.

14. Has the party ever met with any accidental or serious personal injury? If so, what was it?—No.

15. Name and residence of party's usual medical attendant, or (if he have none) of some other medical person to be referred to for information as to his health.—Refers to Adam Schoener, M. D., as an acquaintance.

16. Name and residence of an intimate friend to be referred to for similar information.—C. H. L. Hoffiditz, Reading, Pa.

17. Amount of insurance applied for, $5,000?—Five thousand dollars.

18. Term for which the insurance is desired, and specific plan.—Life.

19. Has a previous proposal been made for insurance in this or any other company; and if so, was it accepted or not; and if accepted, for what amount?—Yes; accepted for $5,000.

20. Is the party aware that any untrue or fraudulent allegations made in effecting the proposed assurance will render the policy void, and that all payments of premiums made thereon, and dividend-credits accruing therefrom, will be forfeited?—Yes.

|| (Signed) ANTHONY A. McDONOUGH.

Witness: EDWIN TILDEN.

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§ If these interrogatories are not explicitly and fully answered, the application will be declined or returned for completion.

|| In signing write the Christian name in full.

THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY.

Questions to be answered by the physician of the party applying for insurance.

1. How long have you known
2. Have you been in the habit of seeing h frequently and giving h medical attendance, and for what disease?
3. What is h temperament, height, and general appearance?
4. Has the party's parents, brothers, or sisters been afflicted with pulmonary complaints, or any other disease that tends to shorten life; and if so, what?
5. Has at any time been afflicted with any disease of the brain or nervous system; of the lungs; of the heart, its valves or the blood-vessels; bowels, stomach, liver, or urinary organs; if so, what? If a female, state condition of uterine organs and character of labors.
6. Give the stethoscopic character of respiration and heart's action.
7. State the average rate and other qualities of the pulse.
8. Has , in your opinion, an hereditary predisposition to any disease; and if so, what is it?
9. Do you believe that is now in good health?
10. Is now sober and temperate? Has h always been so?
11. Are the party's habits active or sedentary?
12. Do you believe that possesses a healthy constitution?
13. What, in your opinion, is the party's prospect for longevity?

Dated at , 186 .

(Signed) ——— ———.

I certify that I have been personally acquainted with , of , during the last years, and do believe that h habits of living are temperate, and that . is now in good health, and does ordinarily enjoy good health, and that I know of no constitutional infirmity or other circumstances affecting h calculated to make an insurance on h life more than usually hazardous.

Dated at this day of , 186 .

(Signed) ——— ———.

(Indorsed:) Gilman. Connecticut Mutual Life-Ins. Company, of Hartford, Conn. Ouitrans tulit sustinet. No. 69322 of policy. Date, March 26, 1867. Sum assured, $5,000. Term of life. Proposer, Mary D. McDonough. Residence, , wife. Life of Anthony A. McDonough. Residence, Reading, Pa. Occupation, physician. Place and date of birth, August 11, 1805. Dated at 25 day of March, 1867. Age, 62. Premium, $421.50. Extra do., at $. Policy, $. $. Gilman. Agents are requested not to fill the above blanks. Agent, Edwin Tilden, at Reading, Pa. Received 27 day of March, 1867. Leave blank. , 1869.

99 (Copy.)

No. 69322.]

CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY, OF HARTFORD, CONN.

This policy of insurance witnesseth: That the Connecticut Mutual Life-Insurance Company, in consideration of the declarations and representations made to them in the application for this insurance, and the sum of four hundred and twenty-one dollars and fifty cents, to them in

hand paid by Mary D. McDonough, wife of Anthony A. McDonough, of Reading, Pa., and of the annual premium of four hundred & twenty-one dollars and fifty cents, to be paid on or before the twenty-sixth day of March in every year during the continuance of this policy, do assure the life of Anthony A. McDonough, of Reading, in the county of Berks, State of Pennsylvania, for the sole use of the said Mary D. McDonough, in the amount of five thousand dollars, for the term of the whole continuance of his life.

Annual premium, $421.50.

And the said company do hereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured to the said assured, her executors, administrators, or assigns, for her sole use, within ninety days after due notice and proof of the death of the said Anthony A. McDonough, deducting therefrom all notes taken for premiums unpaid at that date.

Term of life.

And in case of the death of the said Mary D. McDonough before the decease of the said Anthony A. McDonough, the amount of said insurance shall be payable after her death to her children, for their use, or to their guardian, if under age, ninety days after notice and proof of the death of the said Anthony A. McDonough as aforesaid.

Sum insured, $5,000.

And it is hereby conditioned and agreed that if at any time after three premiums have been paid on this policy it shall be surrendered while yet in force, the company will issue a paid-up non-forfeiture policy therefor, or such an amount as the then present value of this policy would purchase as a single premium:

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Anthony A. McDonough shall die upon the seas, or shall, without the consent of this company, previously obtained and endorsed upon this policy, pass either by sea or land beyond the settled limits of the United States, (excepting by land or on lakes and rivers into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, or shall, without such previous consent thus endorsed, visit California or Oregon, or pass into the Territories of the United States lying west of the twenty-fifth meridian of longitude from Washington; or shall, without such previous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted;) or shall, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as fireman or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder; or in case he shall become so far intemperate as to impair his health or induce delirium tremens, or shall die by his own hand, or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the State or the United States, or of any government where he may be, this policy shall be void and of no effect.

And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers, and declaration made by the said Mary D. McDonough, and bearing date the twenty-fifth day of March, 1867, and which are hereby made part and parcel of this policy, as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case

this policy shall be null and void; or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.

And it is further understood and agreed that this policy shall not take effect and become binding on said company until the premium above named shall be actually paid to said company, or to some person authorized by them to receive it.

And it is further agreed that in every case where this policy shall cease or become or be null or void, all previous payments made thereon and all dividend-credits accruing therefrom shall be forfeited to the said company.

In witness whereof the said Connecticut Mutual Life-Insurance Company have, by their president and secretary, signed and delivered this contract, in the city of Hartford, this twenty-sixth day of March, one thousand eight hundred and sixty-seven; but the same shall not be binding until countersigned by Edwin Tilden, agent at Reading, Penn'a.

GUY R. PHELPS,
President.

W. S. OLMSTED,
Secretary.

Countersigned at Reading this fourth day of April, 1867.

EDWIN TILDEN, *Agent.*

[50-c. internal-revenue stamp.]

100

No. 69322.

Original ann'l premium	$421 50
Cash	$211 50
Interest on 1 note	12 60
Extra premium	
Cash	$224 10
Forborne	$210

Received amount as above this 6th day of March, 1868.
By Edwin Tilden.

(Copy.)

OFFICE OF CONNECTICUT MUTUAL LIFE-INSURANCE CO.,
Hartford, March 26, 1868.

Received (as per margin) premium and dues on policy No. 69322, in full for insuring the life of Anthony A. McDonough, to March 26, 1869. But this receipt shall not be valid or in force until payment is made as indicated in the margin, and this receipt countersigned by Edwin Tilden, agent at Reading, Pa.

W. S. OLMSTED, *Sec'y.*

No agent has authority in any case to waive or postpone payments of premiums, or to make binding or continue any policy of insurance, except by countersigning the receipts for specified policies issued from the office of the company at Hartford, and signed by the secretary; and by mutual agreement (see policy) the delay of payment of the premium beyond the day of date of the policy makes void the insurance and renders the policy invalid.

[2-cents rev. stamp.]

No. 69322.

Annual premium	$421 50
Cash	$211 50
Interest on two notes,	25 20
Extra premium	
Total cash payment,	$236 70
Note for am't forborne	$210

Received amount as above, this 13 day of March, 1869.
By Edwin Tilden.

(Copy.)

OFFICE OF CONNECTICUT MUTUAL LIFE-INSURANCE CO.,
Hartford, March 26, 1869.

Received (as per margin) premium and dues on policy No. 69322, in full for insuring the life of Anthony A. McDonough, to March 26, 1870. But this receipt shall not be valid or in force until payment is made as indicated in the margin, and this receipt countersigned by Edwin Tilden, agent at Reading, Pa.

W. S. OLMSTED, *Sec'y.*

No agent has authority in any case to waive or postpone payments of premiums, or to make binding or continue any policy of insurance, except by countersigning the receipts for specified policies issued from the office of the company at Hartford, and signed by the secretary; and by mutual agreement (see policy) the delay of payment of the premium beyond the day of date of the policy makes void the insurance and renders the policy invalid.

[2-cents rev. stamp.]

101 The annual premium required to continue this policy in force must be paid on or before the day of the date of the same, or the insurance ceases, and the policy is void. The only evidence of payment of such premium which will be acknowledged by the company as valid and binding is a certificate of renewal, signed by the secretary of the company. Certificates for this purpose will be furnished (for delivery to policy-holders) to those agents of the company who are authorized to collect premiums on account of the company; but as such authority is liable to frequent changes and subject to be revoked without the knowledge of the insured, and as persons not so authorized may solicit payment of premium, representing that their receipt or indorsement will renew the policy, the policy-holders are cautioned not to pay renewal-premiums to any person except upon delivery of a renewal-certificate, issued from the office of the company, and signed by the secretary. This caution is important to policy-holders, to prevent payments being made to irresponsible persons, or those not authorized by the company to receive them, thereby not only losing the money paid, but forfeiting the insurance also.

For the convenience of policy-holders, these renewal-certificates will be furnished to the agents through whom the policy was issued, or at the location where it was last renewed, to be delivered upon the payment of the premium, unless otherwise directed by the insured; but the possession of the renewal-certificate is the only evidence to the policy-holder of the authority of the agent to receive the premium.

Acceptance of the premium due on this policy by the company or its agents after the day upon which it is due must be considered as acts of grace or courtesy, and in no wise to be construed as forming a precedent for future payments, or a waiver of the forfeiture of the policy according to the conditions therein expressed, if any future payment of premium be omitted on the day it falls due.

Agents of the company are in no case authorized to make, alter, or discharge contracts, or waiver forfeitures.

Proofs of death required.

1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death.

2d. A certificate of a disinterested acquaintance of the deceased, certifying to the time and fact of his death, and that he or she was the person insured by that name in this company.

3d. A certificate from the undertaker, sexton, or clergyman who officiated at the funeral of the deceased and saw the body interred.

4th. A certificate from some intimate friend of the deceased of the age of the party at the time of his death.

These several certificates should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation.

(Indorsed:) No. 69322. The Connecticut Mutual Life-Insurance Company of Hartford, Conn. Assurance on the life of Anthony A. McDo-

nough. Amount, $5,000. Date, March 26, 1867. Term of life. Annual premium, $421.50. Extra do., $. When due, Mch. 26. Cash part of payment, $211.50; policy & stamp, $1.50—$213.00. Amount of note, $210.00. $423.00.

[Press of Case, Lockwood and Brainard, Hartford, Conn.]

102 and read them to the jury.

And then they called Adam Schwenk, who testified that he is one of the plaintiffs, being guardian of the Nolan minors; knew Mary McDonough, wife of Dr. McDonough. My wards are her children. She died April 18, 1868. Dr. McD. died April 11, 1869. She left four children, named in the narr. The suit is brought for their benefit. Notice was given the co. of the death of Dr. McD. It was in writing. There was a certificate of the Dr. & undertaker, & a man who was with him when he died. Gave notice within 60 days. The co. made objections that the Dr.'s age did not agree with the policy. Found no fault with the forms of proof. Tilden's (the agent) office was in Keystone Bldg., Reading. The youngest child is about 8 yrs. old; the oldest about fourteen. Mrs. McDonough was formerly Mary Dunn, then Nolan, & was a widow when Dr. McDonough married her.

Xd.—Knew Mrs. McDonough before she married the Dr. Did not know her first husband. Was with Dr. McD. when he died. I got acquainted with him in 1853. I was with him Sunday & on Monday when he died, about two in the afternoon. I am his son-in-law.

103 He had 14 children by his first wife, and 4 by 2nd wife; 2 of these by second wife died; served notice of death on Mr. Tilden, in Reading, about 2 or 3 weeks after the death.

The Dr. was insured in another co.—the Continental of N. Y. Have known the Dr. 20 years. Did not know Mrs. McDonough's first husband.

The proofs of death were then called for and read in evidence, as follows:

CITY OF READING,
Berks County, ss:

On this 20th day of April, A. D. 1869, before me, the subscriber, one of the alderman of said city in and for said county, personally came William Nolan, who, being duly sworn according to law, says that he was intimately acquainted with Dr. Anthony A. McDonough, who died on the 12th day of April instant, and that he was at the time of his death between sixty-six and seventy years of age according to the best of his jdgmt.

WILLIAM NOLAN.

Sworn and subscribed before me the day and date above.

GEORGE PRINTZ,
Alderman.

104 CITY OF READING,
Berks County, ss:

On the 22d day of April, A. D. 1869, before me, the subscriber, one of the alderman of said city, in and for said county, personally came Charles Henninger, who, being duly sworn according to law, says that he officiated at the funeral of Dr. Anthony A. McDonough; that he buried him in the Catholic cemetery, and saw his body interred on the fifteenth day of April, A. D. 1869, and that he was the undertaker.

CHARLES HENNINGER.

Sworn and subscribed before me the day and date above.
GEORGE PRINTZ,
Alderman.

CITY OF READING,
Berks County, ss:

On this 27th day of April, A. D. 1869, before me, the subscriber, one of the alderman of said city, in and for said county, personally came Dr. Daniel A. Ulrich, who, being duly sworn according to law, says that he attended Dr. Anthony A. McDonough during his last sickness. The nature of the disease was evidently coma with paralysis, coming on suddenly and lasting about eighteen hours, and died about ten o'clock
105 p. m., on the 12th day of April, 1869.

DAN'L A. ULRICH, *M. D.*

Sworn and subscribed before me this 27th day of April, A. D. 1869.
GEORGE PRINTZ,
Alderman.

CITY OF READING,
Berks County, ss:

On this 27th day of April, A. D. 1869, before me, the subscriber, one of the aldermen of said city, in and for said county, personally came John H. Kelly, who, being duly sworn according to law, says that he was a disinterested acquaintance of Dr. Anthony A. McDonough; that he died on the 12th day of April, A. D. 1869, and that he was with him at the time of his death, and that he was the person insured in the Connecticut Mutual Life-Insurance Company of Hartford, Connecticut.

JOHN H. KELLY.

Sworn and subscribed before me the day and date above.
GEORGE PRINTZ,
Alderman.

106 Owen O. Reilly testified: I knew Dr. & Mary McDonough. I was present at their marriage on March 4, '59. Her name was Nolan. She had two children by Nolan that I know of.

Xd. I knew Nolan. His name was Terrence. He was a contractor, & lived in a shanty on the railroad—the Little Valley R. R. Suppose she lived with him. I only knew of two children.

Michael Dunn testified: Am guardian of two minors. Nolan died about five miles above Lebanon. I don't know when.

107 The counsel for the defendant having moved for a nonsuit on the ground that the age of the insured stated in the proofs of death did not correspond with that stated in the application for insurance, the counsel for the plaintiffs offered to prove that the age of the insured was different from that stated in the proofs of death furnished by the plaintiffs to the defendant, and for that purpose called William Nolan, the person who made the affidavit of the age of Dr. McDonough among the proofs of death, and offered to prove by him that he was mistaken as to the age of the insured, having no knowledge on the subject; to which offer the defendant objected, because there had not been any notice given prior to the trial that such evidence would be offered; and the court permitted the evidence to be given; whereupon the coun-

sel for the deft. excepted to the ruling of the court & tendered an exception thereto, which was thereupon allowed and sealed.

Wm. Nolan sw. I made that affdt. I met Mr. Schwenk, the guardian of the children. He told me he was making out of proofs of the age. I said, judging from his appearance, that he was about of the age
108 mentioned in the affdt. which I then took. It was a mere guess, just as I would judge as to one of you by looking at you. I might have been mistaken. I made the affdt. because Schwenk told me the insurance company require' it, and I made it to enable him to get the money. I had known Dr. McD. several years before his death. I cannot remember exactly when; I think in 1864. I reside in Reading. I did not then reside there. I moved there when I was married. I am a cousin of the two Nolans.

And to maintain the issue on its part the defendant called Henry H. Brownmiller, who, being duly sworn, said: I live in Bernville; did not know Dr. McDonough; never saw him. (Produces the minutes of Bernville Lodge, 122, I. O. O. F.) I am the secretary of the lodge. I never saw the man. My father was living as far back as the date of the minutes. It is necessary for a man to make an application. The application states the age. The committee sign the application. They inquire the name, age, and occupation. In my application my
109 name was stated. Then the committee investigate and report whether the applicant is worthy of being received.

The older an applicant is the more he has to pay for initiation. The rate is increased every five years.

George Brownville, being duly sworn, said: I live in Berks Co., Swe densburg. I am a member of Bernville Lodge, 122; knew Dr. McDon ough. He was a member and joined the lodge the same day I did, in 1845. I have seen the minute-book of the lodge before. He was present in the lodge and became a member the same time I did. The minutes of the lodge are read out in the lodge. The minutes of the previous meeting are read at the opening of the lodge. We joined the night the lodge was organized. I saw the doctor there at other times. Dr. McDonough was secretary for several terms of 3 or 6 mos. each. (Witness recognizes and identifies the signatures of the doctor as secretary.) When I made my application I gave my name, age, and occupation to the secretary, and Dr. McDonough did the same.

The defendant then offered in evidence the said minute-book of Bernville lodge, to show the age of Dr. McDonough as recorded
110 therein in the usual manner of keeping the records of said lodge; to which offer the plaintiff objected and the court sustained the objection.

Whereupon the counsel for the defendant excepted to the ruling of the court and tendered an exception thereto, which was thereupon allowed and sealed.

111 Before sealing the bill of exceptions it is noted as part thereof that the printed memorandum in the words—

"*Proofs of death required.*

"1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death.

"2d. A certificate of a disinterested acquaintance of the deceased, certifying to the time and fact of his death and that he or she was the person insured by that name in this company.

"3rd. A certificate from the undertaker, sexton, or clergyman who officiated at the funeral of the deceased, and saw the body interred.

"4th. A certificate from some intimate friend of the deceased, of the age of the party at the time of his death.

"These several certificates should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation"—

endorsed on and folded in the policy of insurance was neither read nor exhibited to court, jury, or counsel, and was not seen by the court or by counsel till after the verdict.

112 And inasmuch as the said offers of evidence and the rulings thereon, so excepted to, do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the rulings of the said court, and requested that the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this the sixteenth day of April, A. D. 1874.

JOHN CADWALADER, [L. S.]
Judge.

113 In the Supreme Court of the United States.

CONNECTICUT MUTUAL LIFE-INS. CO., PLAINTIFF in error,
vs.
ADAM SCHWENK ET AL., DEFENDANTS IN ERROR.

Assignment of errors.

1. The court below erred in permitting the defendants in error and plaintiffs below to give evidence to prove that the age of Dr. Anthony A. McDonough was different from that stated in the proofs of death furnished by them to the plaintiff in error and defendant below; and for that purpose, in permitting them to prove by William Nolan, the person who made the affidavit as to the age of said Dr. McDonough, among the proofs of death, that he was mistaken as to the age of the insured, having no knowledge on the subject, without requiring notice to be given prior to the trial that such evidence would be given and correction made.

2. The court below erred in rejecting the minute-book of Bernville Lodge No. 122, I. O. O. F., which was offered by the plaintiff in error to show the age of Doctor Anthony A. McDonough, as recorded therein in the usual manner of keeping the records of said lodge.

M. ARNOLD,
WM. S. PRICE,
Attys. for Plff. in Error.

114 *Bond sur writ of error.*

In the Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company, a citizen of the State of Connecticut, plaintiff in error and defendant below,
vs.
ADAM SCHWENK, GUARDIAN OF FERGUS Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, citizens of the *of the* State Pennsylvania, defendants in error and plaintiffs below.

Thomas W. Price, residing at No. 1809 Mount Vernon street, Walter H. Tilden, residing at No. 1636 Green street, in the city of Philadelphia, in the State of Pennsylvania, do acknowledge ourselves indebted to Adam Schwenk and Michael Dunn, guardians as above said, in the sum of twelve thousand dollars, upon condition that the above-named Connecticut Mutual Life-Insurance Company, plaintiff in error, prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good.

Witness our hands and seals this twelfth day of October, A. D. 1874.

THOMAS W. PRICE. [SEAL.]
WALTER H. TILDEN. [SEAL.]

Sealed and delivered in the presence of us—
SAMUEL BELL.
M. ARNOLD.

Approved by the court October 12, 1874.

115 Original citation sur writ of error sent to Washington by counsel.

116 Original writ of error sent to Washington by counsel.

117 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.:

I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between Adam Schwenk, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharian Nolan, plaintiffs, and The Connecticut Mutual Life-Insurance Company, defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court at Philadelphia, this twentieth day of November, A. D. 1874, and in the 99th year of the Independence of the United States.

[SEAL.]

SAMUEL BELL,
Clerk Circuit Court U. S, E. D. of Penna.

118 In the Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company, a citizen of the State of Connecticut, plaintiff in error and defendant below,
vs.
ADAM SCHWENK, GUARDIAN OF FERGUS JOSEPH McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, citizens of the State of Pennsylvania, defendants in error and plaintiffs below.

Issue writ of error to the circuit court of the United States for the eastern district of Pennsylvania, (April session, 1872, No. 13,) returnable sec. leg.

WM. S. PRICE,
M. ARNOLD,
Attys. for Plff. in Error.

To the clerk of above court.
Oct. 12, 1874.

True copy of original on file in this office.
[SEAL.]
SAMUEL BELL,
Clerk C. C.

(Endorsed:) No. . Term 1874. S. C. U. S. Conn. Mutual Life-Ins. Co. vs. Schwenck et al. Præcipe for writ of error. M. Arnold, W. S. Price, for plff. in error. Filed October 12, 1874.

119 UNITED STATES,
Eastern District of Pennsylvania, sct.:

The President of the United States to the judges of the circuit court [SEAL.] of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between Adam Schwenk, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan and Catharine Nolan, citizens of the State of Pennsylvania, plaintiffs, and The Connecticut Mutual Life-Insurance Company, a citizen of the State of Connecticut, defendant, in a plea of trespass on the case, a manifest error has entervened, to the great damage of the said The Connecticut Mutual Life-Insurance Company, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October instant, (1874,) that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Su-

preme Court of the United States, at Philadelphia, this twelfth day of October, A. D. one thousand eight hundred and seventy-four, and in ninety-ninth year of the Independence of the said United States.

SAMUEL BELL,
Clerk Cir. Ct. U. S., E. D. of Pa.

120 In the Supreme Court of the United States.

CONNECTICUT MUTUAL LIFE-INS. CO., PLAINTIFF in error,
vs.
ADAM SCHWENK ET AL., DEFENDANTS IN ERROR.

Assignment of errors.

1. The court below erred in permitting the defendants in error and plaintiffs below to give evidence to prove that the age of Dr. Anthony A. McDonough was different from that stated in the proofs of death furnished by them to the plaintiff in error and defendant below; and for that purpose in permitting them to prove by William Nolan, the person who made the affidavit as to the age of said Dr. McDonough among the proofs of death, that he was mistaken as to the age of the insured, having no knowledge on the subject, without requiring notice to be given prior to the trial that such evidence would be given and correction made.

2. The court below erred in rejecting the minute-book of Bernville Lodge No. 122, I. O. O. F., which was offered by the plaintiff in error, to show the age of Doctor Anthony A. McDonough as recorded therein in the usual manner of keeping the records of said lodge.

M. ARNOLD,
W. S. PRICE,
Attys. for Plffs. in Error.

(Indorsement on cover:) No. 261. The Connecticut Mutual Life-Insurance Company, plaintiff in error, vs. Adam Schwenk, guardian of Fergus Joseph McDonough and Theresa McDonough, and Michael Dunn, guardian of Charles Nolan & Catharine Nolan. E. Pennsylvania C. C. U. S. Filed 19th December, 1874.

REC. 261—5

Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY

vs.

ADAM SCHWENK AND MICHAEL DUNN, GUARDIANS OF THE MINOR CHILDREN OF MARY D. McDONOUGH, DECEASED, WHO WAS THE WIFE OF DR. ANTHONY McDONOUGH, DECEASED.

WRIT OF ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

MICHAEL ARNOLD,
WILLIAM S. PRICE,
Counsel for Plaintiff in Error.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

Supreme Court of the United States.

WRIT OF ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY

vs.

ADAM SCHWENK AND MICHAEL DUNN, Guardians of the minor children of Mary D. McDonough, deceased, who was the wife of Dr. Anthony McDonough, deceased.

BRIEF OF PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

In the court below the action was *assumpsit* by Adam Schwenk and Michael Dunn, guardians of the minor children of Mary D. McDonough, deceased, wife of Dr. Anthony A. McDonough, deceased, against the Connecticut Mutual Life Insurance Company, upon a policy of insurance for $5000 on the life of said Anthony A. McDonough.

The policy in suit is dated March 26th, 1867. It was issued upon an application signed by both Anthony A. and Mary McDonough. In the application, the age of the insured was given as sixty-two years, his birthday being stated as having been

August 11th, 1805. He died on April 12th, 1869. When the plaintiffs came to prepare their proofs of death, before demanding payment of the amount of the policy, they stated his age to be between sixty-six and seventy years. The proofs of death thus showed that he was from two to six years older than he stated in his application. The insurance company declined to pay because of the misrepresentation of his age, and suit was commenced against it. At the trial, the plaintiffs having offered in evidence the policy and proof of death closed their case, whereupon the counsel for the defendant moved for a nonsuit. This was refused, and the plaintiffs were permitted to contradict their proofs of the age of the insured. To this permission the defendant objected that previous notice had not been given of the intention to change their proofs, and that the defendant having gone to trial on the proofs as furnished, the plaintiffs ought not to be allowed to contradict those proofs without having given previous notice of their intention to do so. The objections of the defendant were overruled, whereupon an exception was taken by the defendant. This constitutes the first assignment of error.

In the course of the trial the defendant called a witness, who produced the minute-book of the Bernville Lodge of Odd-Fellows.

It was proved that it was the official duty of the secretary to make and keep the minutes of the lodge; that membership of the lodge is obtained upon petition, which must state, among other things, the age of the applicant; and that the fee for initiation and membership varies according to the age of the applicant—young men being charged less than old men, so that it is the interest of any one who would secure admission at a low rate by misstating his age, to fix his birthday at a later time than it actually occurred. The minutes of the lodge show that Dr. McDonough was initiated on September 6th, 1845, and that he stated that his age was forty-six years, which fixed his birthday as having been in the year 1799. The minutes also show that he was elected secretary of the lodge on January 24th, 1846, or four months and a half after the initiation, and that he served

until March 21st, 1846; and that he was again elected secretary on June 28th, 1851, and served until September 24th, 1853; and he was again elected secretary on March 31st, 1855, and was in office on July 12th, 1856, when the minute-book was filled up, during all of which periods the minute-book, with his age thus stated in it, was in his possession, so that he could, and no doubt, did see the statement of his age thus set down in it, when his application for membership was received, and by reason of his possession of the book was affected with knowledge of the statement of his age contained in it; and that if it was wrong he did not correct the same, or move to have it corrected by the lodge.

This minute-book was then offered in evidence by the defendant, and it was rejected by the court, whereupon the defendant took an exception; and this forms the second assignment of error.

BRIEF OF ARGUMENT.

The first assignment of error is in these words:—

First.—The court below erred in permitting the defendants in error and plaintiffs below to give evidence to prove that the age of Dr. Anthony A. McDonough was different from that stated in the proofs of death furnished by them to the plaintiff in error and defendant below, and for that purpose in permitting them to prove by William Nolan, the person who made the affidavit as to the age of said Dr. McDonough among the proofs of death, that he was mistaken as to the age of the insured, having no knowledge on the subject, without requiring notice to be given prior to the trial that such evidence would be given and correction made.

The affidavit as to the age of McDonough is as follows:—

CITY OF READING, }
COUNTY OF BERKS, } *ss.*

On the twentieth day of April, A. D. 1869, before me, the subscriber, one of the aldermen of the said city in and for said

county, personally came William Nolan, who, being duly sworn according to law, says, that he was intimately acquainted with Dr. Anthony A. McDonough, who died on the second day of April, instant, and that he was, at the time of his death, between sixty-six and seventy years of age, according to the best of his judgment.

WILLIAM NOLAN.

Sworn and subscribed before me, the day and date above.

GEORGE SMITZ,
Alderman.

This assignment of error relates to the ruling of the court, permitting the plaintiffs below to correct their proofs of death at the trial without previous notice to the defendant.

The plaintiff in error contends that this ruling was erroneous, according to the decision of the Supreme Court of Masachusetts in Campbell *vs.* Charter Oak F. & M. Ins. Co., 10 Allen, 213.

That was a case of fire insurance. The policy had conditions annexed, that upon a loss, due proof should be submitted to the company, setting forth, among other things, how the property was used and occupied. The proofs of loss showed that the building was occupied and kept as a hotel, and that as the insured was not licensed to keep such hotel, he was carrying on an unlawful business, which avoided the policy. The plaintiff offered to correct this statement at the trial, but without previous notice, by showing that the building insured was a summer hotel, not open on the day of the fire, which the court permitted him to do, and on error the Supreme Court reversed this ruling.

This decision has lately been approved and followed by this court in the case of the Mutual Life Ins. Co. *vs.* Newton, 22 Wallace, 32. And to the same effect is Irving *vs.* Excelsior Ins. Co., 1 Bosworth, 50.

To parties trying a case on short notice and without previous preparation, as this case was tried, such a rule of practice is indispensable.

The second assignment of error is in these words:—

Second.—The court below erred in rejecting the minute-book of Bernville Lodge, No. 122, I. O. O. F., which was offered by the plaintiff in error to show the age of Dr. Anthony A. McDonough, as recorded therein, in the usual manner of keeping the records of said lodge.

The minutes of said lodge, so far as they relate to the matter in controversy, are printed in the appendix to this brief, on page 13.

This assignment of error relates to the rejection of the minute-book of Bernville Lodge of Odd-Fellows, which was offered to prove the age of McDonough, the insured.

An examination of the testimony (Record, page 41) will show how these minutes are made up. The candidate for initiation and membership makes an application, in which he states his name, occupation, and age, which are entered at large upon the minutes. In the minutes of Bernville Lodge, of September 6th, 1845, it appears that an application for membership was received from "A. A. McDonough, Physician, age 46 years," which was read and referred to a committee. He was subsequently reported "favorable" and elected, and at this same meeting, the first held by the new lodge, he was appointed "Conductor." (See the minutes as printed in this brief, at pages 14, 15, and 16.) At the sixth meeting of the lodge, four and a half months afterwards,—that is, on January 24th, 1846,—he was elected secretary and served until March 21st, 1846. On June 28th, 1851, he was again elected secretary and held the office until September 24th, 1853; and on March 31st, 1855, he was again elected secretary, and was in office on July 12th, 1856, when the book was filled. During all these terms he had the custody of the minutes, and could have read and no doubt did read the entry of his application and statement of his age set down in these minutes of the first meeting, and he never corrected nor asked the lodge to correct the statement of his age contained in the minute-book. The law

affects him with notice under such circumstances. And besides this, all the members of a company are chargeable with knowledge of the entries made on their books by their agent in the course of his business, and with the true meaning of those entries as understood by the agent. Allen *vs.* Coit, 6 Hill (N. Y.), 318.

"So, after a party was proved to be a member of a society, the entries in a book containing a record of the proceedings of the society (the book being produced at the meetings, and open to the inspection of all the members) were held to be admissible against him." Phillips on Evidence, vol. i., page 447, citing Raggett *vs.* Musgrove, 2 C. & P., 556.

The evidence was rejected in accordance with the ruling in the Fraternal Mutual L. Ins. Co. *vs.* Applegate, 7 Ohio State Rep., 292, in which case it was held that where a policy was issued for the benefit of a wife, the admissions of the husband, who was the insured, made *after its issue*, were not competent evidence.

It was supposed that Westropp *vs.* Bruce, Batty's Irish Rep., 155, would also support this ruling; but on examination, it will be found that in that case it was the party claiming the insurance money, who offered the previous declarations of the insured to corroborate his statement in the application, which offer was rejected.

Neither of the above cases can be applied here, for in our case the evidence, if it is to be treated as a declaration of the insured, was made prior to the application for insurance and comes within the ruling in Kelsey *vs.* Universal L. Ins. Co., 35 Conn., 225, in which case it was decided that in an action by a husband on a policy of insurance on the life of his wife, letters written by her prior to the application for insurance, were admissible to contradict her statements in the application.

And yet the time of making such declarations does not seem to be important, for in Aveson *vs.* Kinnaird, 6 East, 188, declarations subsequent to the application were admitted to contradict or disprove the representation in the application, while in Edwards *vs.* Barron, cited in Ellis on Ins., page 123, letters

written by the insured both before and after the insurance was effected, were admitted in evidence.

It is therefore contended by the plaintiff in error that the weight of authority favors the admission in evidence of statements of the insured made prior to the date of the application for insurance, for the purpose of contradicting the statements made in the application.

It may be said that a man cannot know his own birthday, and, therefore, he cannot tell his own age, except from hearsay. But such a statement as this overlooks the fact that a man's age is one of the elements of his pedigree, and that in proving pedigree hearsay evidence is always admitted. Greenleaf on Evidence, section 103.

The parent tells the child when he was born and how old he is, and it is not doubted by any one that in giving the information regard for truth is sacredly observed by the parent. It is universal practice in preparing interrogatories to ask a witness his name, *his age*, his occupation, and his residence. No better evidence of age is ever sought or required than the statement of the party himself whose age is inquired after. That his birth, and, consequently, his age, is part of a man's pedigree, has been decided by the Supreme Court of Pennsylvania, in American Life Insurance and Trust Company *vs.* Rosenagle and Wife, 77 Pa. State Rep., 507, citing Greenleaf on Evidence, section 104.

But it may be contended that as the policy sued upon was issued in favor of the wife, the declaration and acts of the husband, whose life was insured, should not be received in evidence against the wife. The Court of Queen's Bench has lately considered this question in the case of Moriarty and Wife *vs.* The London, Chatham and Dover Railway Company, 5 Law Rep., 2 B., 314, which was an action by husband and wife against the company for injuries done to the wife on the cars of the company and by the negligence of its servants. The defendant offered evidence to show that the husband attempted to suborn a witness to swear that he was on the train and saw the accident, offering to give the witness a portion of the amount recovered. The

court took until the next day to consider the offer, when it was admitted. On a motion for a new trial, the court unanimously agreed upon the admissibility of the evidence.

The better rule seems to be that as the insurance is made upon the truthfulness of the statements made by the insured in the application, and that as these statements are warranted to be true, his statements made prior to making the application ought to be admitted to show that the statements in the application are not true. Or, in other words, as the party to be benefited by the insurance makes the insured his witness, it is allowable to contradict the statements of a witness made at one time, by showing what he said at another. Schlater *vs.* Winpenny, 75 Penn. St. Rep., 321.

It is therefore respectfully contended that even upon the ground of its being an admission made before suit brought, it should have been admitted.

The competency of this evidence is also put upon this ground. That is, that the entry or declaration of a mere third person may be admissible as original evidence where it accompanies and is explanatory of the nature and quality of a material fact, or as secondary evidence, where it is admissible on a principle of necessity warranted by particular circumstances, which afford a reasonable assurance that the party whose testimony is no longer attainable knew the fact, and communicated it faithfully.

The early cases which announced this rule coupled it with a condition that the entry should contain something against the interest of the party making it. The case most directly in point is Higham *vs.* Ridgway, 10 East, 109, where the book entry of a man midwife who had attended in confinement the mother of the person whose age was in question, was admitted in evidence after the death of the midwife to prove the age of the child he had delivered. The entry was one of a series in the books of account of the midwife, and contained the entry of payment for the service, which, in the opinion of the court, made it an entry

against the interest of the person making it, and for that reason entitled to be received in evidence to prove everything contained in it. And yet the same judge, Lord Ellenborough, in a subsequent case, where the entries in an attorney's bill-book of his charges for drawing a lease, were admitted to prove that the lease, although dated August 31st, 1770, was not in fact executed until after September 29th, 1770, when it commenced to run (Doe *vs.* Robson, 15 East, 32), totally ignored the previous reason that the entry was against the interest of the person making it, and put his decision on the ground that the attorney who made the entry had no interest to pervert the fact, and at the same time was competent to know it.

A curiously-reported case is to be found in Sir Thomas Raymond's Rep., page 84, the case of Herbert *vs.* Tuckal, Mich. Term, 15 Car., II. The report is in full as follows:—

"Upon evidence in a trial at bar the question was, If one was of full age at the time of his will made by him? And upon evidence it appears that he was born the fourteenth day of February, 1608, and he made his will when he was of the age of twenty-one years, within two days; and to prove his non age, the defendants produced an almanack, in which the father had writ the nativity of the devisor, and it was allowed to be strong evidence."

This case is approved in Roe *vs.* Rawlings, 7 East, 279, by Lord Ellenborough, C. J., who said, at page 290, "there are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus, the written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will. And yet the most that can be said for such evidence is the peculiar means of knowledge of the fact by the father, and the absence of all interest in him at the time of the memorandum or declaration made, to falsify the truth in respect to it."

In Vulliamy *vs.* Huskisson, 2 Jurist, 656, a statement in a

will by a father of the date of the birth of his daughter was held to be good *prima facie* evidence of the date of her birth.

In Clark *vs.* Wilmot, 1 Young & Collier, 53, entries in the books of the deceased attorney of the defendant were admitted as evidence for the plaintiff in a bill of foreclosure, to prove that the whole mortgage money had been paid to the defendant, and that there was no usury; such entries, though not against the interest of the party making them (an attorney) being made in the usual course of his business.

The case of Augusta *vs.* Windsor, 19 Maine, 317, was an action between two counties for charges incurred by the plaintiff on account of a pauper properly chargeable to the defendant. It was important to show at what time one Linscote had his leg broken, and for the purpose of fixing the date, the plaintiff offered in evidence the day-book of the doctor who attended Linscote, and it was admitted.

The reason given by Lord Ellenborough, in Higham *vs.* Ridgway, that the evidence should be admitted because the entry of the third person making it was against his interest, was said by Mr. Justice Story, in Nicholls *vs.* Webb, 8 Wheaton, 334, to be very artificial reasoning, and he demonstrates it by showing that the material part of the entry which went to show the age of the subject of inquiry was made six months after the service. This case decided that the books of a notary regularly kept were evidence after his decease, to prove demand and notice of non-payment of a note.

As late as the year 1868, Vice-Chancellor Stuart, in discussing the principles on which the written statements of third parties (since deceased) are admissible in evidence, said, "It has been said, although, I think, with no very great force, that such entries, not being against the interest of the person making them, are inadmissible. The fact of the entries being against the interest of the person who makes them is said to be the circumstance that gives them credibility and establishes them as evidence. But I think that is not entirely an accurate view of the matter. I quite assent, however, as other judges have assented,

to the statements of Mr. Starkie, on page 347 of the same volume (ed. 1842, page 347). He there says this:—'It may, however, be observed that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems both in reason and upon the authorities to afford a much safer warrant for giving credit to such evidence than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party, &c.'" Giffard *vs.* Williams, 38 Law J. Ch., 603.

In Doe *vs.* Turford, 3 Barn. & Ad., 890, 23 Eng. Com. Law. Rep., 388, it was proved that it was the usual course in an attorney's office for the clerks to serve notices to quit on tenants, and to endorse on duplicates of such notice the fact and time of service. On one occasion, the attorney himself prepared a notice to quit to serve on a tenant, and took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of having delivered it to the tenant; and it was held after the attorney's death that the endorsement so made by him was admissible evidence to prove the service of the notice made by him.

The ruling in Davis *vs.* Lloyd, 47 Eng. C. L. Rep. (Carr. and Kir.), page 275, has not been generally approved. The action was trespass, and to defeat the plaintiff it was attempted to show that he was not twenty-one years old. To do this, it was proved to be a Jewish custom to circumcise children the eighth day after their birth, and that it was the duty of the Chief Rabbi to perform this rite and make an entry of it in a book. It was proposed to give in evidence this book, with the entry of the plaintiff's circumcision, the entry being in the handwriting of the Chief Rabbi, who was dead. The decision of the court by Ld. Denman, C. J., is terse, but not convincing, "I have conferred with my brother Patterson, and we think the evidence is not receivable."

Mr. Taylor, in his book on Evidence, section 633, says of this

case:—"It seems difficult to reconcile it with sound principle or with previous decisions." It may be observed, however, that the book offered did not contain in itself all the matter necessary to establish the fact it was offered to prove, but it required to be supplemented with proof of a custom which, together with the entry in the book, went to establish the plaintiff's age.

MICHAEL ARNOLD,
WILLIAM S. PRICE,
Counsel for Plaintiff in Error.

APPENDIX.

COPY OF THE MINUTES OF BERNVILLE LODGE, I. O. O. F.

BERNVILLE, BERKS COUNTY, September 6th, 1845.

A special session of the Right Worthy Grand Lodge of the Independent Order of Odd-Fellows of the State of Pennsylvania convened at two o'clock, P. M., in the Odd-Fellows' Hall in this place, for the purpose of opening and constituting Bernville Lodge, No. 122. Session of Grand Lodge.

William A. Wells, R. W. D., D. G. M., presiding. Chair.

After the presentation and reading of the cards of the petitioners for the charter, Brothers James S. Shoemaker, Samuel S. Ruth, Morgan D. Medlar, Levi Stamm, and Daniel Billman, the five subordinate degrees were duly conferred on them; the officers proceeded to the opening and constituting of the new lodge and the presentation of the charter for the same. After receiving same, the brethren made choice of their officers, presenting— Officers.

James S. Shoemaker as Noble Grand,
Morgan D. Medlar as Vice-Grand,
Samuel S. Ruth as Secretary,
Levi Stamm as Assistant Secretary,
Daniel Billman as Treasurer,

Elected for Bernville Lodge

who were all duly installed into their several respective chairs, serving until the end of the current quarter. Installed.

The Constituting Officer, after giving the new officers the necessary, usual, and proper introductions, declared Bernville Lodge, No. 122, to be a regular constituted lodge of the Independent Order of Odd-Fellows, in accordance with the ancient laws and usages of the Order. The special session of the Right Worthy Grand Lodge now closed, and Bernville Lodge, No. 122, Lodge constituted. Grand Lodge closed and No. 122 opened.

of the I. O. of O. F., of the State of Pennsylvania, organized and proceeded to business.

Chair. Noble Grand James S. Shoemaker in chair.

Applications for membership and committee. Applications for membership of Daniel Deppen, physician, age 44 years; Anderson D. Harvey, tanner, age — years; John Yeager, innkeeper, age 33 years; Daniel Bentz, innkeeper, age 34 years; Isaac Spang, merchant, age — years; George Brownmiller, teacher, age 40 years; A. A. McDONOUGH, PHYSICIAN, AGE 46 YEARS; Michael Noll, carpenter, age 25 years; Michael Seltzer, innkeeper, age — years; David Renno, innkeeper, age — years; Jeremiah Missimer, merchant, age — years; David P. Boyce, physician, age — years, and John E. Billman, boatman, age — years, recommended by N. G. Shoemaker and Treasurer Billman, were read and referred to committee, Brothers V. G. Ruth, Secretary Stamm, and Treasurer Billman.

Application for membership on card. Applications for membership on card were made by Brother Emanuel Stamm, of Symmetry Lodge, No. 103, read and referred to committee—Brother V. G. Ruth, Secretary Medlar, and Secretary Stamm.

Proxy representation to Grand Lodge. The Lodge, on motion, now proceeded to the election by ballot of a proxy representative from this Lodge to Right Worthy Grand Lodge of the State of Pennsylvania, when Past Grand Israel R. Deacon, of Crystal Fount Lodge, No. 110, was declared duly elected, and the secretary of the lodge was directed to make out the necessary credentials, and forward same to D. D. G. M. of this district for transmission to the proper quarter.

Hour for meeting. On motion, it was agreed upon that the stated meeting to be held this evening shall be opened at an hour earlier than the usual hour of meeting, say quarter before seven o'clock.

Receipts.

Received proposition fee of			Daniel Deppen, . .	$2 00
"	"	"	Anderson D. Harvey, .	2 00
"	"	"	John Yeager, . .	2 00
"	"	"	Daniel Bentz, . .	2 00
"	"	"	Isaac Spang, . . .	2 00
			Carried forward,	$10 00

			Brought forward,	$10 00
Received	proposition	fee of	George Brownmiller,	2 00
"	"	"	A. A. McDonough,	2 00
"	"	"	Michael Noll,	2 00
"	"	"	Michal Seltzer,	2 00
"	"	"	David Renno,	2 00
"	"	"	Jeremiah Missimer,	2 00
"	"	"	David P. Boyce,	2 00
"	"	"	John E. Billman,	2 00
				$26 00

No more business being before the lodge, it closed in usual form, in peace and harmony. Adjournment.

Attest:

MORGAN D. MEDLAR,
Secretary.

Bernville, Berks County, September 6th, 1845.

A stated meeting of Bernville Lodge, No. 122, of the I. O. of O. F. of the State of Pennsylvania, was held this evening, opening at 6¾ o'clock. Stated meeting.

Noble Grand James S. Shoemaker in the chair. Chair.

Officers all present and in their several respective chairs.

The minutes of the last meeting were read, and on motion adopted. Minutes.

The committee on applicants at last meeting reported favorable. On motion, the reports were accepted, committee discharged, the candidates balloted for, and Daniel Deppen, Anderson D. Harvey, John Yeager, Daniel Bentz, Isaac Spang, George Brownmiller, A. A. McDonough, Michael Noll, Michael Seltzer, David Renno, Jeremiah Missimer, and David P. Boyce, were elected, the balls all being white. John E. Billman, at two several ballotings having received one black ball, was not elected, and his case laid over until the next stated meeting. Reports on applicants and balloting. Laid over.

Report on card and election. The committee on card of Brother Emanuel Stamm made favorable report, and fixing the sum of one dollar to funds and one dollar to contingent fund, as the price to be paid for its reception. On motion, the report was accepted. Committee discharged. Brother balloted for and duly elected.

Initiation. Candidate Daniel Deppen, Anderson D. Harvey, John Yeager, Daniel Bentz, Isaac Spang, George Brownmiller, A. A. McDonough, Michael Noll were introduced and initiated into the mysteries of Odd-Fellowship.

Appointed officers. The Noble Grand made the following appointments:—

Brother Daniel Deppen, R. H. S. to N. G.
Andrew J. Haney, L. H. S. to N. G.
A. A. McDonough, Conductor.
Daniel Bentz, Senior Warden.
John Yeager, Inside Guardian.
Isaac Spang, Outside Guardian.
Brother Michael Noll, Right-Hand Scene Supporter.

Appointed officers. The Vice-Grand appointed Brother I. Brownmiller as his Right and Emanuel Stamm his Left Hand Supporter.

Laws to work by. On motion, it was agreed upon that this Lodge adopt the Constitution and By-Laws of Montgomery Lodge, No. 59, for their government, until the adoption and approval of one of their own.

Application for membership. Application for membership recommended by Brother Vice-Grand Ruth was handed in, read, and referred to committee, Brother F. G. Ruth, Secretary Stamm, and Emanuel Stamm.

Receipts.

Initiation fee of Daniel Deppen,		$8 00
" " John Yeager,		4 00
" " Anderson D. Harvey,		4 00
" " Daniel Bentz,		4 00
" " Isaac Spang,		4 00
" " George Brownmiller,		8 00
" " A. A. McDonough,		*13 00*
" " Michael Noll,		4 00
	Carried forward,	$49 00

Brought forward,	$49 00
Initiation fee of Emanuel Stamm, ...	1 00
" " Samuel R. Kershner, . . .	2 00
	$52 00
Amount brought forward, ...	26 00
	$78 00

No more business being before the Lodge, it closed, with usual form, in peace and harmony. Adjournment.

Attest: MORGAN D. MEDLAR,
Secretary.

BERNVILLE, BERKS COUNTY, September 13th, 1845.

A stated meeting of Bernville Lodge, No. 122, of the I. O. of O. F. of the State of Pennsylvania, was held this evening, opening at seven and half o'clock, Noble Grand Shoemaker in chair, officers all present and in their several respective chairs. Stated meeting. Chair.

The minutes of last stated meeting were read, and upon motion adopted. Minutes adopted.

The Noble Grand stated to the Lodge the objections which were stated to him by the brother who voted a black ball against John E. Billman, on last stated meeting night, and then caused the usual ballot to be taken, but the candidate was not elected, there being four black balls. The committee on applicant Samuel R. Kershner reported favorable, on motion the report was accepted, the committee discharged, candidate balloted for, but not elected, there being in each of the two ballotings held one black ball. Re-ballot for candidate of rejection. Report on candidate and laid over.

Application for membership of Jacob Sooder, stone-cutter, age — years, Womelsdorf, recommended by Brother Daniel Bentz, was handed in, read, and referred to committee—Brothers McDonough, Spang, Yeager. Proposition for membership.

On motion, agreed that the treasurer give his bond for two hundred dollars, without fail. Treasurer's bond.

Election of trustees.

On motion, it was ageeed that the Lodge now proceed to the nomination and election of three trustees. After the nominations were made election was held, which resulted in the following choice, to wit:—

Brother Daniel Deppen, trustee for
" John Yeager, trustee for
" Isaac Spang, trustee for

Receipts.

RECEIPTS.

Proposition of Jacob Sooder, ...	$2 00
Amount after elected, ...	1 61
	$3 61
Amount brought forward,	78 00
	$81 61
Deduct proposition fee of John Billman, . . .	2 00
	$79 61

Adjournment.

No more business being before the Lodge it closed, with usual form, in peace and harmony.

Attest: MORGAN MEDLAR,
Secretary.

BERNVILLE, BERKS COUNTY, September 20th, 1845.

First stated meeting. First quarter, First year.

The first stated meeting of first quarter, first year of Bernville Lodge, No. 122, of the I. O. of O. F. of the State of Pennsylvania, was held this evening, opening at seven and a half o'clock.

Chair.

Noble Grand James S. Shoemaker in chair.

Absentees.

Officers absent, Right-Hand Supporter to the Noble Grand, Brother Daniel Deppen, and Senior Warden or R. H. S. S. Noll.

Minutes adopted.

The minutes of last stated meeting were read and upon motion adopted.

Candidates elected.

The Noble Grand stated to the Lodge that since the last stated

meeting no objections had been made known by the brother who had thrown an opposing ball in the ballot for candidate Samuel R. Kershner, and that, therefore, by said default the candidate was now declared elected.

The committee on application Jacob Sooder reported favorable.

On motion the report was accepted, the committee discharged, the candidate balloted for and elected.

On motion an order was drawn, favor of the Noble Grand, for Grand Lodge percentage, for Journal of Proceedings of the M. W. Grand Lodge U. S. of I. O. of O. F., and three dozen cards, amount six dollars and fourteen cents. Bill paid.

On motion the Lodge closed with usual form.

After the Lodge closed the members all being present in the hall, information being given that one of the elected candidates was in waiting and desired to be initiated, a proposition was made and agreed to reorganize, the hour yet being early.

The Lodge therefore reorganized in special meeting.

Noble Grand Shoemaker in chair.

The minutes of the preceding stated meeting were read.

Candidate Samuel R. Kershner was now introduced and initiated into the rites and mysteries of Odd-Fellowship, in accordance with the established law and usages of the Order.

Initiation fee of Brother S. R. Kershner, .	$4 00	
Amount of dues collected, ...	1 50	
	——	$5 50
Amount brought forward, . . .		79 61
		——
		$85 11

No more business being before the Lodge, it closed with usual form in peace and harmony.

Attest:

MORGAN MEDLAR,
Secretary.

DIGEST OF MINUTES.

Condensed and digested, these minutes read as follows:—

September 6th, 1845. The Lodge was constituted this day by the Grand Lodge of Pennsylvania, which met at two o'clock in the afternoon.

Immediately thereafter and yet in the afternoon, the new lodge held a meeting, when

"Applications for membership of" (several persons, among whom was) "A. A. McDonough, Physician, age 46 years, were read and referred to a committee."

September 6th, 1845. The next entry is a stated meeting held the same day in the "evening, opening at 6¾ o'clock."

"The committee on applicants at last meeting reported favorable."

"On motion the reports were accepted, committee discharged, the candidates balloted for, and" (several persons, among whom was) "A. A. McDonough, were elected."

"Candidates" (among whom was) "A. A. McDonough, were introduced, and initiated into the mysteries of Odd-Fellowship."

"The Noble Grand made the following appointments":—

"Brother A. A. McDonough, Conductor."

"Receipts—Initiation fee—A. A. McDonough, $13."

There are others varying from $4 to $8, but Dr. McDonough's is the highest. The evidence of Henry H. Brownmiller, secretary of the lodge, was "The older an applicant is the more he has to pay for initiation. The rate is increased every five years." See record, page

September 13th, 1845. The next meeting was held this day.

"Officers all present and in their respective chairs."

This shows he was present so as to hear the minutes read, because the minutes show that when any of the appointed officers are absent, their absence is noted. (See the minutes of September 20th, 1845, page 18.)

The same minute-book shows that Dr. McDonough was elected Secretary of the Lodge, kept the minute-book, and entered the minutes during the following periods.

He was first elected Secretary on January 24th, 1846, the sixth meeting of the Lodge, and served until March 21st, 1846. He was again elected Secretary June 28th, 1851, and served until September 24th, 1853. He was again elected Secretary March 31st, 1855, and was in office July 12th, 1856, when the book was filled up with entries. The subsequent minute-book was not produced. During these periods the book was in his possession as Secretary.

No. 261 Term, 187

Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

PLAINTIFF IN ERROR,

vs.

ADAM SCHWENK and MICHAEL DUNN, Guardians of the minor children of Mary D. McDonough, deceased, who was the wife of Dr. Anthony A. McDonough, deceased,

DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

LUDOVIC C. CLEEMAN,
WM. H. LIVINGOOD,
Attorneys for Defendants in Error.

Allen, Lane & Scott's Printing House, 233 South Fifth Street, Philadelphia.

Supreme Court of the United States.

The Connecticut Mutual Life Insurance Company, Plaintiff in Error,

vs.

Adam Schwenk and Michael Dunn, Guardians of the minor children of Mary D. McDonough, deceased, who was the wife of Dr. Anthony A. McDonough, deceased, Defendants in Error.

Term.

No.

BRIEF OF DEFENDANTS IN ERROR.

COUNTER-STATEMENT.

The statement of the case contained in the brief filed for the plaintiff in error is not concurred in.

It is an *argument* made upon a very partial view of the evidence, and intended to present the facts as nearly as possible as the exigency of the plaintiff's case requires that they should be made to appear. The following, however, is respectfully presented as a complete statement from the pleadings and the whole evidence of all that is necessary for a full understanding of the points involved, and which will be found, it is believed, to be a fair deduction from the entire evidence as spread upon the record.

This action was brought by the defendants in error, upon a life policy dated March 26th, 1867, procured by Anthony A. McDonough, in the name and for the sole use and benefit of his wife, and in case of the death of his said wife, Mary D. McDonough, before his decease, the amount of said insurance was payable to her children, for their use or to their guardian, if under age, ninety days after notice and proof of death. She died on the sixteenth day of April, 1868, and her said husband on the twelfth day of April, 1869, leaving two children by her former husband, to wit, Charles Nolan and Catharine Nolan, and two by the insured, Joseph Fergus McDonough and Theresa McDonough, who by their guardians, Adam Schwenk and Michael Dunn, are defendants in error.

The application for insurance was signed by "Mary D. McDonough, Anthony A. McDonough," at Reading, March 25th, 1867. To the questions, "place and date of birth of person whose life is proposed to be insured—giving month and day?" Answer, "Ireland, August 11th, 1805. "Age next birthday?" "Sixty-two."

The declaration contains the common counts in *assumpsit*, setting forth the policy, the application, and interrogatories with answers. To this the defendant filed fifteen pleas. The first two were "*non est factum*" and "covenants performed"; the next plea "that the said Anthony A. McDonough was not born in the year 1805," and the remaining pleas set up misrepresentations and false allegations in the application as to the health and habits of the insured; and were traversed by replication.

The issues of fact thus made presented only one ground of defense, to wit, that the application whereon the policy issued was untrue.

At the trial below the plaintiffs put in evidence the policy, proofs of death, and by request of defendant's counsel, the application for insurance, and called Adam Schwenk, who swore that he gave all the proofs of death, within sixty days after the death, to Mr. Tilden, the agent of the company defendant, who did not object to the forms of proof.

The defendant asked for a nonsuit on the ground that one of

the affidavits (that by Mr. Nolan) furnished with the proofs of death showed an age inconsistent with that stated in the application. This was refused, and the court allowed the plaintiffs to call Nolan to explain his affidavit—who swore as follows:—

"I made that affidavit. I met Mr. Schwenk in the street. He told me he was getting proof of the doctor's age. It was necessary to get somebody to tell about the doctor's age. I said I could give a guess. I told the alderman I could only give to the best of my judgment from his appearance. I might be mistaken in this." In cross-examination he said, "I made affidavit because Mr. Schwenk said he wanted proof. I made it for Mr. Schwenk to get the money from the insurance company. I had no positive knowledge."

In the course of the trial, the plaintiffs offered to prove an age different from that in the application, by giving in evidence a certain entry or statement contained in the minute-book of the Bernville Lodge, dated September 6th, 1845, and for that purpose the book itself was offered in evidence. The court refused to permit evidence of this statement for the purpose offered, the book was accordingly rejected, and the plaintiff in error again excepted. The court below tried the case before a jury and found all the issues in favor of the plaintiffs. The plaintiff in error moved for a new trial. The motion was overruled and judgment entered.

BRIEF OF ARGUMENT.

It is difficult to perceive any force in the first assignment of error of the plaintiff in error.

There is a vital difference between the facts of the case at bar and those of the cases of Campbell *vs.* Charter Oak Fire and Marine Insurance Company, 10 Allen, 213; and Irving *vs.* Excelsior Insurance Company, 1 Bos., 507, cited by the plaintiff in error.

In both of these last cases the furnishing of the proof of loss was required by the terms of the policy, and the loss was the very thing insured against. In our case the policy only requires

proof of death, and the additional affidavit of age was immaterial and surplusage.

See Taylor *vs.* Ætna Life Ins. Co., 13 Gray, 434.

Kingsley *vs.* New Eng. Mut. F. I. Co., 8 Cush., 393.

The case of the Mutual L. Ins. Co. *vs.* Newton, 22 Wallace, 32, cited by plaintiff in error, does not sustain the position taken in the cases of Campbell *vs.* Charter Oak F. and M. Ins. Co., and Irving *vs.* Excelsior Ins. Co. The judge who tried the case had excluded the preliminary proofs of death, when offered by the defendants on the trial below. The Supreme Court said they ought to have been admitted, remarking:—"They were intended for the action of the company and upon their truth the company had a right to rely. Unless corrected for mistake the insured were bound by them." (Page 36.) There seemed to be no dispute but that the proof could be corrected. Referring to the case of Campbell *vs.* Charter Oak F. and M. Ins. Co., and Irving *vs.* Excelsior Ins. Co., the court say:—"It is not necessary, however, to maintain any doctrine as strict as this in the present case, and possibly the rule there laid down is properly applicable only where the insurers have been prejudiced in their defense by relying upon the statements contained in the proofs."

Now in our case there could no such prejudice accrue to the plaintiff in error. In the *narr.* filed, the age of Dr. McDonough was expressly stated to be such as corresponded with that in the application for insurance, and the defendants below had pleaded that the age was different. Issue had been joined in this more than a year before the trial, and so there could be no surprise.

What the state of the pleadings was in the case of Campbell *vs.* the Charter Oak Fire and Marine Insurance Company, is not set out in the report of the case, but we may infer from the opinion of the court that the plaintiffs went to trial on the statement as contained in the preliminary proof, for the court say:—"We do not mean to say that the party may not correct mistakes of fact in his original statement, but such corrections are not for the first time to be made known to the insurers at the trial."

The court further places the decision expressly on the ground that the preliminary proofs were a condition precedent in the policy, which was for insurance against loss by fire.

In a subsequent case in the same court, where the suit was brought on a policy of insurance on life, Cluff *vs.* Mutual Benefit Life Insurance Company, 99 Mass., 317, the court held a different doctrine to that in the case of Campbell *vs.* Charter Oak Fire and Marine Insurance Company. The plaintiffs below had furnished with their preliminary proofs of death certain newspaper cuttings detailing the circumstances of the death of the insured. The insurance company offered these in evidence, but the offer was overruled and an exception taken. The court above ruled that no prejudice had been occasioned thereby, saying:—"When an apparent ground of defense is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the condition imposed upon his right to litigate his claim; and the effect of such disclosure to defeat the action must depend upon the degree to which the plaintiff is bound by the statement. If not sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct, the whole question will be open to explanation and proof upon the main issue, subject to the usual rules of evidence."

The result of this examination of the case of Campbell *vs.* Charter Oak Fire and Marine Insurance Company is, that to make it apply to our case the preliminary proof must have been a condition in the policy, and the defendants have learnt at the trial, for the first time, that the plaintiffs proposed to correct their proof.

Neither of these conditions apply to our case; the proof of age was not required by the policy; and by the *narr.*, pleas, and replication the very question of age was put in issue, the *narr.* averring an age inconsistent with that in the proof.

But the cases of Campbell *vs.* Charter Oak Fire and Marine Insurance Company, and Irving *vs.* Excelsior Insurance Company, are no longer considered law. Bliss, in his "Law of Insurance," citing these cases, says:—"It seemed at one time to be held that the assured is bound by the statements contained in the proofs presented by him, unless before the trial he notifies the

company of some error in them, and cannot otherwise be permitted to contradict them at the trial, but *the current of recent decisions is to hold the contrary.*" The cases cited by him fully bear him out. The first case, that of McMasters *vs.* Insurance Company of North America, 55 N. Y. Reports, 222, discusses and overrules the cases of Campbell *vs.* Charter Oak Fire and Marine Insurance Company and Irving *vs.* Excelsior Insurance Company. In denying the authority of the latter case, the court say that the point decided was not necessary to the decision of the case, and was *obiter dictum.* As to the case of Campbell *vs.* Charter Oak Fire and Marine Insurance Company, they say the decision is rested mainly on the ground that the proof of loss was a condition in the policy precedent to recovery, and the court add that if by the decision is meant a recognition of the applicability of the doctrine of an estoppel *in pais*, they are compelled to differ with the conclusion arrived at. The court denied that the truth of the proofs of loss was a condition precedent, and said the proofs of loss were neither a contract or any part of a contract, nor did they create a liability to pay loss; they merely served to fix the time when the loss became payable, and provided they were furnished in time to the insurer, could be amended at will afterwards.

In this case of McMasters *vs.* Insurance Company of North America, the plaintiff had declared in his proof of loss that there was other insurance on his property, and this, by the terms of the policy, would have avoided it, but he was allowed to show on the trial that the statement was a mistake.

The other cases cited by Bliss all agree with the case last cited.

In Hubbard *vs.* Hartford Fire Insurance Company, 33 Iowa, 325, the plaintiff, in his proof of loss, mentioned a subsequent insurance, which, by the terms of the policy, would have avoided it, but he was allowed to show on the trial that the subsequent insurance was invalid.

In Ætna Insurance Company *vs.* Allen, 48 Ill., 431, the plaintiff, in his proof of loss, inadvertently omitted certain articles that had been destroyed, and he was allowed to prove on the trial the loss of those articles.

In Commonwealth Fire Insurance Company *vs.* Huckberger, 52 Ill., 464, the plaintiff, in his proof of loss, had stated the loss inaccurately, not having access to his books of account, and he was allowed on the trial to correct the proof.

It will be seen that these are all cases of fire insurance, where the proof of loss was made by the plaintiff himself, and was required by the terms of the policy. *A fortiori* should the rule apply when not made by the plaintiff himself, or required by the policy? See, also, North America Insurance Company *vs.* Burroughs, 69 Penna. St. Rep., 43; Germania Insurance Company *vs.* Curran, 8 Kans., 9.

The second assignment of error does not indicate the particular fact or ground of objection in relation to which the learned court is alleged to have erred; but the brief in support of it indicates that the minute-book was offered as containing a declaration made by the insured, in regard to his age, and that the evidence was rejected, in accordance with the ruling in the Fraternal Mutual Life Insurance Company *vs.* Applegate, 7 Ohio Stat. Rep., 292.

We would respectfully submit that the learned court did not rely entirely upon this ruling. But the burden of proving error under this head, as at all points, being upon the plaintiffs, a general discussion will not be intruded upon this court, but an effort will be made merely to follow and review the argument of the plaintiff in error.

The brief of the argument on behalf of the plaintiff in error, under this head, may be properly divided into four divisions.

It is argued—

1. That the insured did make a declaration in point of fact by becoming a member of the Bernville Lodge.

2. That his declaration upon that subject was competent, because the declaration of a person having peculiar knowledge in the ordinary course of his private business, and whose testimony is no longer attainable.

3. That it is the declaration of a person upon whose statement the policy was issued, and the falsehood of which was to vitiate the policy.

4. That a man's age is one of the elements of his pedigree, and that in proving pedigree hearsay evidence is admitted.

I. As to the fact that the insured did make a declaration as to his age.

Dr. McDonough made no entry as to his age in the minute-book of the lodge. He did not make the entry referred to, nor direct it to be made. He was not a member of the lodge at the time it was made. The minutes of that meeting were read and adopted before he was introduced into the mysteries of that order. There is not a particle of evidence anywhere in this case to show that he knew of this entry, much less that *he acquiesced in it.* The application for membership was not produced. There was no copy shown nor contents of the same proved. It was referred to in the minutes, and for that reason alone the book was properly rejected. But it is argued that Dr. McDonough might have read this minute; that sometime after he was elected secretary, and that being a member of the body, the law affects him with notice, citing Allen *vs.* Coit, 6 Hill, 318; Phil. on Evidence, volume 1, page 447; 2 C. & P., 556. The principle laid down in these cases cannot be applied here. The question of agency cannot arise. Dr. McDonough was not a member when the entry was made.

This question, however, is one which the court will determine from the record, and it is needless to prolong the discussion.

II. That his declaration upon that subject was competent, because the declaration of a person in the ordinary course of his private business having peculiar knowledge, and whose testimony is no longer attainable.

The general rule is that evidence ought to be on oath, subject to cross-examination by the person against whom it is given. The sanction of an oath and cross-examination by the adversary are solemn methods to ascertain the truth, and in this reflects the wisdom of the law. The exceptions to this general rule against hearsay evidence embraces certain declarations made by deceased persons; but the admissibility of such is limited to a very few cases.

Under this head the case adverted to by the plaintiff in error is Higham *vs.* Ridgway, 10 East., 109, where the book-entry of a midwife was admitted in evidence. But this case cannot be applied here, for in our case the entry made in the minute-book was not made in the ordinary course of his private business, nor had he peculiar and competent knowledge. How can a living man know his own age? That knowledge does not come by intuition or instinct, it is derived from some one who knows it and is necessarily hearsay. Westroph *vs.* Bruce, Batty's Irish Rep., 155. The case of Herbert *vs.* Tuckal, where the father had written the nativity of his son differs in this that the father does know of his own knowledge the time of birth. Who would know the age of a child better than its parents? And so in Roe *vs.* Rawlings, 7 East., 279; 2 Jurist, 656, we have memoranda made by parents of the birth of the child.

In the case of Clark *vs.* Wilmot, 1 Young & Collins, 53; Augusta *vs.* Windsor, 19 Main, 317; Doe *vs.* Turpord, we have the cases of attorneys and doctors who in the course of their professional work make proper entries of what it is their duty to enter.

In the case of Smith *vs.* Blakely, 2 Court of Queen's Bench, 334, Lesh, J., says:—"And where an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons; but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it."

III. That it is the declaration of one upon whose statement the policy is issued, and the falsehood of which was to vitiate the policy.

Under this head the plaintiff in error cites Kelsey *vs.* Universal Life Insurance Company, 35 Conn., 225; Aveson *vs.* Kinnard, 6 East., 188; Edward *vs.* Barre, Ellis on Insurance, page 123. In these cases the insured, immediately before and after the policy was executed, wrote letters and made statements as to

the condition of health they were in. Bliss on Insurance, page 629, in reciting these authorities, says:—"If the declarations offered to be proved are at or about the time of insurance, there is some plausibility in the argument in favor of their admissibility, though it is rather a forced argument to urge that such declarations are part of the *res gestæ* only because they were very nearly or quite coincident in point of time. If the question is as to knowledge of the insured as to his condition, it would be proper to apply the rule more liberally."

It is difficult to discover upon what ground these declarations were received, and is unnecessary to pursue the inquiry for the purpose of this argument. The declaration in this case is not coincident with the insurance, but on the contrary was made more than twenty years before this policy was issued. The other ground is already discussed under the second head of this branch of the argument and needs no further elaboration.

IV. That a man's age is one of the elements of his pedigree, and that in proving pedigree hearsay evidence is admitted.

It is said that birth, and, consequently, age, is part of a man's pedigree, and has been so decided, by the Supreme Court of Pennsylvania, in American Life Insurance and Trust Company *vs.* Rosenagle and wife, 77 Penna. State Rep., 507, citing Greenleaf on Evidence, section 104.

The principle invoked here is this, that the fact of birth may be proved in the manner above mentioned in all cases where it occurs incidentally and in relation to pedigree. In the case of King *vs.* Inhabitants of Erith, 8 East., 539, it is said that "Whether the hearsay declaration of the father as to the place of birth was competent evidence of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it a question of pedigree. The controversy was not, as in a case of pedigree, from what parents the child has derived its birth, but in what place an undisputed birth, derived from known and acknowledged parents, has happened. The point thus stated turns on a single fact, involving no question by locality; and, therefore, not fully within the prin-

ciple of, or governed by the rules applicable to, cases of pedigree; and is to be proved according to the usual and well-known rules of evidence.

So here the question is not as in a case of pedigree involving the relationship and descent of the insured; but the point turns on a single fact, and that is, at what *time* an undisputed birth has happened.

In conclusion it is, therefore, contended, and the defendant in error insists, that the minute-book of the Bernville Lodge was not sufficiently proved as containing an admission as to age; that if sufficiently proved not admissible because hearsay, and does not come under any of the exceptions; that the minute-book, as such, cannot be given in evidence, as proof of entries therein contained, because not kept for the specific purpose of recording age, no public official book required by law, and not kept in the regular course of a man's private business. *Vide* 1 Phill. on Evidence, 320; Clark *vs.* Trinity Church, 5 W. & S., 264–7.

And as to the main question in this case, upon the admissibility of declarations alleged to have been made by the insured in cases where he was not otherwise a party to the contract the conflict is over the law well settled and all the decisions from 6 East., 188, to Edwards *vs.* Barren, are now distinguished and denied by the Supreme Court of the State of Ohio in the case of the Fraternal Mutual Life Insurance Company *vs.* Applegate, and by a still later decision by the Supreme Court of the State of Kansas in the case of the Washington Life Insurance Company *vs.* Haney, 10 Kansas, 525, in which the court say:—"The contract is between the assured and the insurer. The parties are the same, whether that which is insured is a human life or a building. There is this difference, that the life being active can by its conduct affect the contract even so far as to annul it; while the building, being inanimate and passive, has of itself no such power, but aside from this, the rights and liabilities of the parties are the same.

"The party insured is not party to the record, and, therefore,

her declarations are not admissible on that ground; she is not a party in interest, as the whole benefit and interest inures to the assured; she is not the agent and authorized to speak for him, nor does she come within any other rule by which her declarations can be received against him."

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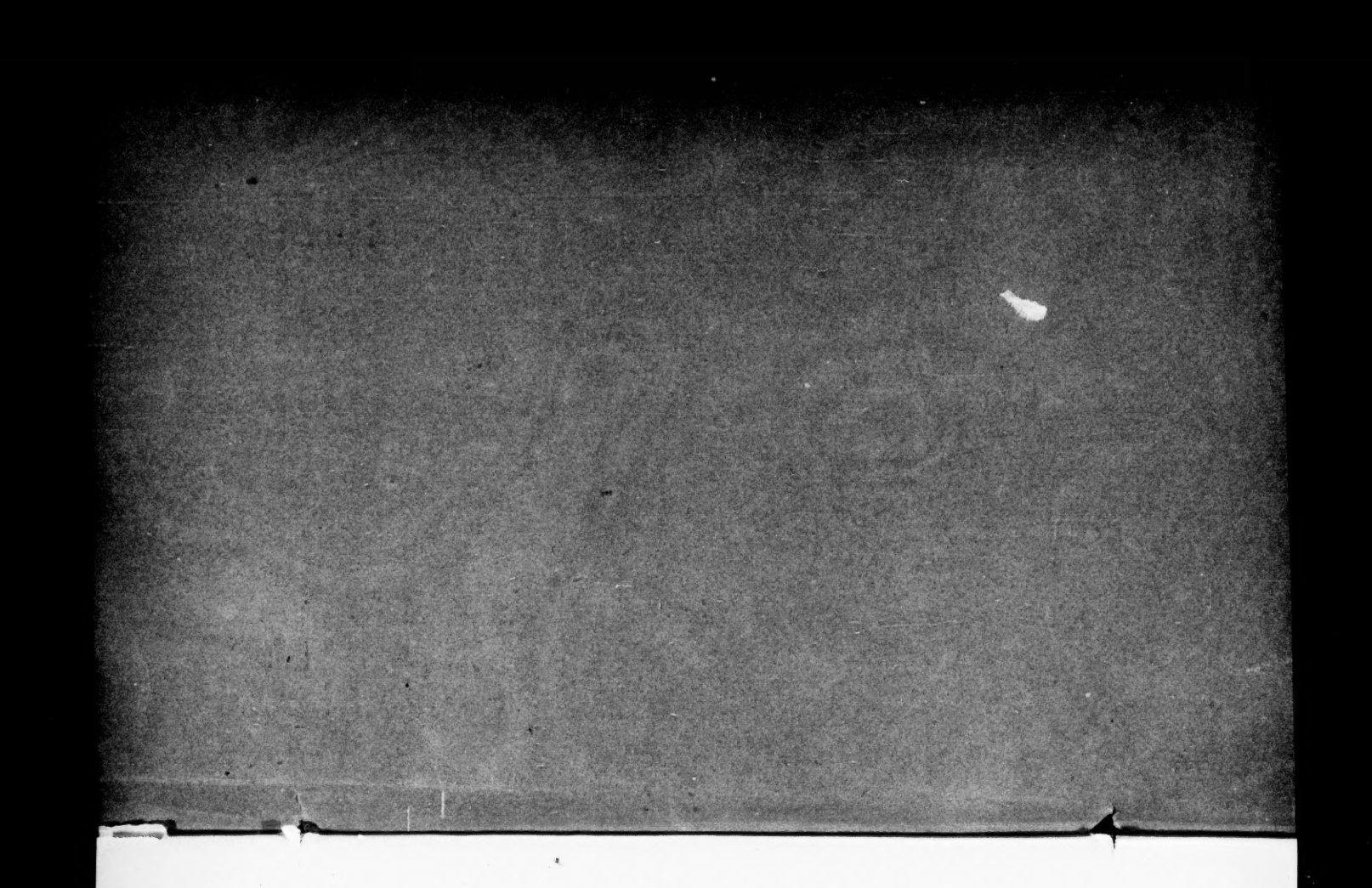

Exhibit
to Motion